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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

HENKEL CORPORATION,

Petitioner,

versus

ROBERT E. TUCK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In resolving employment discrimination cases at the pretext stage under McDonnell Douglas*, should lower courts focus their inquiry on whether the employer "honestly believed" its own explanation for its employment decision?

2. In light of the Appeals Court's finding that a retained employee had greater qualifications than plaintiff, did the Fourth Circuit err in its failure to focus its pretext inquiry on whether the decisionmakers honestly believed their explanation for the employment decision?

3. In employment discrimination litigation, should lower courts and juries be allowed to "second-guess" an employer's business judgment?

4. Where there was no evidence of the decisionmakers' age bias, are age-based comments of non-decisionmakers "material" to a pretext analysis under Burdine* and Liberty Lobby*?

5. In evaluating evidence regarding pretext, did the Appeals Court err in failing to apply Liberty Lobby's requirement that Respondent's evidence be "significantly probative," particularly where there was no evidence of the decisionmakers' age bias in Respondent's layoff?

*McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973).

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1982).

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

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OPINIONS BELOW

Robert Tuck sued Henkel Corporation challenging his layoff from employment in March 1989, as a violation of the Age Discrimination in Employment Act (ADEA). Tuck's layoff resulted from management's selection of employee Mark Smith to serve in a reconstituted plant manager job.

Petitioner moved for summary judgment. After a hearing, the Trial Court granted the motion. (Pet. App. A-2 - A-49). On appeal, a three-judge panel of the Fourth Circuit Court of Appeals reversed the summary judgment, although it agreed with the Trial Court that the record evidence established that Smith had greater qualifications than Tuck.

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on August 25, 1992. Tuck v. Henkel Corp., 973 F.2d 371 (4th Cir. 1992). (Pet. App. A-53 - A-75). Its decision denying rehearing was entered on September 24, 1992. This Petition was timely filed after the Petition for Rehearing was

denied. The Supreme Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

This case arises under the Age Discrimination In Employment Act, 29 U.S.C. § 621 et seq. (Pet. App. A-136).

STATEMENT OF THE CASE

Henkel manufactures specialty chemical products for various business applications, primarily for the textile and paper industries. The Company operated two manufacturing facilities in Charlotte, North Carolina; one on Westinghouse Boulevard and the second on Sugar Creek Road. A workforce reduction occurred in March 1989. Before his layoff, Tuck was plant manager at the Sugar Creek facility. Brent Sears (age 50) was Tuck's supervisor. Sears had overall management responsibility for both manufacturing facilities. Sears' supervisor is Neville McDonald (age 50), Defendant's Vice President. (Pet. App. A-81 - A-83; A-85 - A-86; A-92 - A-93). Tuck was 59 at the time of the layoff.

In late 1988, Sears and McDonald anticipated that the future volume of chemicals needed from the Charlotte facilities would be significantly less than the past year. (Pet. App. A-108). Among other cost reduction measures,[1] McDonald and Sears decided to combine the Sugar Creek plant's technical and manufacturing responsibilities into a reconstituted plant manager position, and thereby eliminate a management level position as part of the workforce reduction. McDonald and Sears' business rationale was that the reconstituted plant manager job could help reduce the plant's day-to-day reliance on the Research and Development (R&D) Group for technical

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[1]For example, they reduced the manufacturing schedule from seven to a five-day schedule. They cancelled a manufacturing supervisory position and laid off additional employees which included: six (6) production operator jobs, a plant security guard, and one manufacturing manager. Also, various job functions and responsibilities were combined and/or eliminated to maximize available technical and management expertise. (Pet. App. A-81 - A-83; A-88 -A-90; A-108 - A-110).

support.[2] Thus, the R&D Group could concentrate more on its primary responsibility for new product development. (Pet. App. A-81 - A-83; A-94 - A-96; A-112).

After deciding to reconstitute the plant manager job, McDonald and Sears evaluated four (4) management employees based on each manager's technical ability, as represented by education and technical experience, and their individual job performance. McDonald and Sears decided that Smith's qualifications and his past work assignments at Henkel[3] best fit their goal for the reconstituted plant manager

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[2]The R&D Group was responsible for new product development; it's professional employees had chemistry degrees from at least the college level or higher. Prior to the 1989 layoffs, the Sugar Creek plant utilized the R&D Group for technical assistance in day-to-day manufacturing operations which reduced the time the R&D Group spent on new product development. Before the layoff, among the Sugar Creek manufacturing staff, there was limited chemistry or chemical engineering expertise including Tuck, who had no technical or college degree in chemistry. (Pet. App. A-84 -A-85).

[3]In 1974 Smith received his B.S. degree in chemical engineering from Purdue University. Two years later, Smith received his Master's degree in chemical engineering. Smith's (continued...)

position. (Pet. App. A-84 - A-85). McDonald and Sears were the only decisionmakers in selecting Smith for the reconstituted plant manager position and Tuck's layoff. (Pet. App. A-86; A-98; A-102; A-115 - A-117). Although Tuck argued that Robert Kahn was a decisionmaker in his layoff, there was no record evidence to support this argument.

Subsequently, Henkel purchased another chemical plant in South Carolina, a business change which led to a later decision to shut down entirely the Charlotte Sugar Creek plant. (Pet. App. A-115 - A-116). After McDonald decided to close the plant, Mr. McKillop (age 56) was assigned to oversee the shutdown. (Pet. App. A-103 - A-105; A-117 - A-119).

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[3](...continued)
employment with Henkel included a number of positions which required extensive technical and management background. These positions included: research engineer (2/1/77 - 12/1/80), pilot plant process engineer (12/1/80 - 12/1/84), process engineer (12/1/84 - 1/1/85), senior process engineer (1/1/85 - 10/1/87) and technical manager (10/1/87 -3/6/89). (Pet. App. A-84 - A-85).

In opposing Petitioner's motion for summary judgment, Tuck presented no evidence that either Sears or McDonald was motivated in any respect by Tuck's age. The Trial Court decided the motion under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Although the Trial Court anaylzed carefully Tuck's argument about his former supervisor's alleged age bias,[4] it decided Petitioner's motion should be granted. (Pet. App. A-2 - A-49).

On appeal, the Fourth Circuit reversed the lower court's decision. Significantly, the Appeals Court concluded: "[i]t is undisputed that Smith had better technical credentials than did Tuck." (Pet. App. A-69) (emphasis added). The Appeals Court concluded Henkel had met its burden under

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[4]Tuck did present evidence that one of his previous supervisors, Rudy Heer, had made age-based statements. (Pet. App. A-133 - A-136). However, the record evidence confirms Heer was not a decisionmaker in the workforce reduction. (Pet. App. A-86; A-98; A-102; A-115 - A-117; A-121). Also, although there was no evidence to support it, Tuck argued that Heer had influenced Sears' decision in his layoff. Sears testified his decision was made independent of Heer. (Pet. App. A-97 - A-98; A-100).

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), by explaining its decision to select Smith for the reconstituted plant manager job. Nevertheless, based on an awkward pretext analysis, the Appeals Court decided "Tuck has shown that Henkel's [business] rationale is unworthy of credence." (Pet. App. A-69).[5]

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[5]The Appeals Court relied upon three specific factual points to support its pretext analysis. First, based upon an affidavit from Marvin Thomas, a production supervisor under Tuck and later Smith, the Appeals Court questioned whether there was any difference--before and after Tuck's layoff--in the plant's actual day-to-day reliance on the R&D Group for technical assistance. (Pet. App. A-69). Second, the Appeals Court noted that about a year after Tuck's layoff, Smith was replaced by a production superintendent, Mr. McKillop, who, it observed, had "no more technical background than Tuck had...." (Pet. App. A-70). Third, after Tuck's layoff, the Appeals Court described Smith as "a poor [plant] manager with little knowledge of or interest in running the plant." (Pet. App. A-70). Significantly, nowhere in its decision did the Appeals Court evaluate the employer's "honest belief" in its reasons for selecting Smith.

REASONS FOR GRANTING CERTIORARI

I. THE APPEALS COURT FAILED TO FOLLOW THIS COURT'S REQUIREMENTS IN ANDERSON v. LIBERTY LOBBY, INC. IN EVALUATING TUCK'S PRETEXT EVIDENCE.

The Appeals Court recognized that Petitioner successfully met its Burdine burden of explaining Tuck's non-selection for the reconstituted plant manager job. In fact, the Appeals Court confirmed the record evidence supporting the management decision: "It is undisputed that Smith had better technical credentials than did Tuck." (Pet. App. A-69) (emphasis added). Under Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), Tuck had to show that there is a dispute "over facts that might affect the outcome of the suit under the governing law." (emphasis added). In employment discrimination cases, this Court's governing law recognizes that when an employer advances specific reasons for a challenged employment decision, a plaintiff's pretext evidence must focus on those specific reasons. Burdine, 450 U.S. at 256 (1981).

None of Plaintiff's evidence purports to undermine Smith's greater qualifications or the honesty of the decisionmakers' belief in their uncontradicted explanation for Smith's selection. Contrary to Burdine, the Appeals Court's pretext analysis in this case focuses on the wrong facts; facts unrelated to management's evaluation of Smith's or Tuck's qualifications. The facts relied upon by the Fourth Circuit do not create a jury issue as to management's honest belief in Smith's greater qualifications.

A. The Fourth Circuit's Pretext Analysis Conflicts With Other Circuits' Correct Analysis.

The Fourth Circuit's pretext analysis did not address the employer's belief in the reasons it had set forth for selecting Smith; rather, the Appeals Court's focus was on the employer's rationale underlying its business judgment to reconstitute the plant manager position. (Pet. App. A-69). The difference between these divergent analyses is more than theoretical. The "honest belief" analysis is entirely consistent with Burdine, the business rationale analysis is contrary to it.

Other circuit courts have recognized the specific inquiry which must be made before summary judgment is foreclosed on a pretext issue. For example, the Seventh Circuit has long recognized that a court's focus must be on whether the employer believed in the reasons it has offered for its employment decision. In Mechnig v. Sears, Roebuck & Co., 864 F.2d 1359, 1365 (7th Cir. 1988), the appeals court analyzed its prior decisions and explained the important distinction between business mistakes and legally significant pretexts:

> [W]e do "not sit as a super-personnel department that reexamines an entity's business decision." No matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, [the ADEA does] not interfere. Rather, our inquiry is limited to "whether the employer gave an honest explanation of its behavior."

(emphasis added) (citations omitted). The Mechnig court affirmed summary judgment in an age discrimination case

where the court found that plaintiff's evidence failed to address the honesty of the employer's belief in its explanation.[6]

Like the Seventh Circuit, other circuit courts have correctly adopted the proper pretext analysis. In Gray v. New

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[6] In McCoy v. WGN Continental Broadcasting Co., 957 F.2d 368, 373 (7th Cir. 1992), the Seventh Circuit emphasized the correct pretext analysis in upholding summary judgment in an age discrimination case:

> Ultimately, however, this court concludes that [plaintiff's] efforts to ward off summary judgment by showing pretext bear more on the issue of mistake on [the employer's] part than on the issue of whether WGN honestly believed in the reasons it has offered for its actions.
>
> . . .
>
> Thus, the issue of pretext does not address the correctness or desirability of reasons offered for employment decisions. Rather, it addresses the issue of whether the employer honestly believes in the reasons it offers. Visser, 924 F.2d at 658-59 (even firing for unethical reason is not evidence of age discrimination).

(emphasis added). See also, Gustovich v. AT & T Communications, Inc., 972 F.2d 845 (7th Cir. 1992) (summary judgment affirmed in ADEA case); Williams v. Williams Electronics, Inc., 856 F.2d 920 (7th Cir. 1988) (summary judgment affirmed in race discrimination case).

England Tel. and Tel. Co., 792 F.2d 251, 256 (1st Cir. 1986), the First Circuit recognized that in evaluating pretext, a court's "focus must be on the perception of the decisionmaker." (emphasis added). Later, in Mesnick v. General Electric Co., 950 F.2d 816, 824 (1st Cir. 1991), cert. denied, ___ U.S. ___, 112 S. Ct. 2965 (1992), the First Circuit again emphasized that in focusing on the decisionmaker's perception, the required inquiry is "whether the employer believed its stated reasons to be credible." (emphasis added)(summary judgment affirmed in ADEA case). The Second Circuit in Meiri v. Dacon, 759 F.2d 989, 997 (2nd Cir. 1985), cert. denied, 474 U.S. 829 (1985), has also circumscribed its pretext inquiry consistently with other circuits. In finding insufficient evidence of pretext, the appeals court affirmed summary judgment for an employer where it found the record evidence confirmed the employer's "honest belief that [plaintiff's] job performance simply did not

measure up to that required [by the employer]." (emphasis added).

The Eleventh Circuit has adopted the same analysis for evaluating pretext as the First, Second and Seventh Circuits. In Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1470 (11th Cir. 1991), the court summarized that circuit's consistent application of the correct legal analysis:

> The inquiry of the ADEA is limited to whether [the decisionmakers] believed that [plaintiff] was guilty of harassment, and if so, whether this belief was the reason behind [his] discharge. See Hawkins v. Ceco Corp., 883 F.2d 977, 980 n. 2 (11th Cir. 1989), cert. den., ____ U.S. ____, 110 S.Ct. 2180, 109 L.Ed.2d 508 (1990) (That the employee did not in fact engage in misconduct reported to the employer is irrelevant to the question whether the employer believed the employee had done wrong.). . . "[F]or an employer to prevail the jury need not determine that the employer was correct in its assessment of the employee's performance; it need only determine that the defendant in good faith believed plaintiff's performance to be unsatisfactory...." Moore v. Sears, Roebuck & Co., 683 F.2d 1321, 1323 n. 4 (11th Cir. 1982) (emphasis in original). See also Jones, 874 F.2d at 1540; Smith v. Papp Clinic, P.A., 808 F.2d 1449, 1452-53 (11th Cir. 1987).

In stark contrast to these other circuit courts, the Fourth Circuit's pretext analysis here focuses on facts--even if true--which do not relate to the honesty of the employer's belief in its reasons for selecting Smith. Particularly where the Appeals Court relies on after-the-fact comparisons to second-guess Henkel's business rationale, its pretext analysis lacks internal logic and will lead to inconsistent results under Burdine and the ADEA.

B. The Fourth Circuit Mistakenly Relies On Evidence Not Related To The Company's Explanation Of Smith's Selection In Finding Pretext In The March 1989 Layoff.

For its pretext analysis, the Appeals Court focused on management's business rationale; i.e., its desire to have a more technically proficient manufacturing manager. (Pet. App. A-69). Allowing Tuck on appeal, and a jury below, to question management's business judgment on whether it needed greater technical expertise in the reconstituted plant manager job is not the purpose of the ADEA and is inconsistent with this Court's holding in Burdine. It

accomplishes nothing under Burdine for the Fourth Circuit to question management's judgment or its business rationale. Indeed, it supplants Burdine's logic to allow the factfinder to roam the evidentiary field to garner a factual dispute to justify a pretext in business logic.

The Fourth Circuit relied upon three evidentiary points to support its conclusion "that Henkel's rationale is unworthy of credence." (Pet. App. A-69) (emphasis added). (See Footnote 5, supra). The Appeals Court relied on Thomas' observation that the plant's operation had not changed vis-a-vis its reliance on the R&D Group's technical expertise, before and after Smith actually began performing his new assignment. The Appeals Court's focus is clearly shown by its observation:

> Even so, it is relevant to consider in assessing the credibility of Henkel's story, that . . . after the R&D Group was relieved of the "burden" of supporting a technically deficient Tuck it helped the plant no less than before and the number of new products it developed was no greater than previously [before Smith].

(Pet. App. A-70) (emphasis added). Whether or not management's business goal was actually achieved after-the-fact says nothing at all about whether management honestly believed it selected the best qualified candidate before-the-fact. Significantly, there is no record evidence that connects Thomas' "before and after" observation with any decisionmaker (Sears or McDonald) for Tuck's layoff.[7]

The same logic applies to the Appeals Court's reliance on Thomas' observation that led the Appeals Court -- not the management -- to conclude that "Smith was a poor [plant] manager with little knowledge of or interest in running the plant." (Pet. App. A-70). Even if Smith thereafter proved to

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[7]Hypothetically, if the Thomas affidavit had reflected he had heard Sears say, for example, that the Company really did not need Smith's greater technical qualifications, such testimony could support a pretext analysis regarding the honesty of Sears' belief in the explanation he put forth in this litigation. Of course, the absolute absence of any such "nexus" evidence in this case reveals the Thomas affidavit for what it is, merely one employee's after-the-fact observations that raise no inferences at all -- and certainly not a reasonable inference -- regarding whether or not Sears and McDonald honestly believed their reasons for selecting Smith.

be a poor selection for the reconstituted job, such evidence sheds no light on the question of management's honest belief about his qualifications before he was selected. Can management make a mistake in judgment without violating the ADEA? Compare McCoy, 957 F.2d at 373-74 (court rejects plaintiff's evidence because it shows possible management mistakes, not pretext).[8]

The Appeals Court's erroneous approach is more clearly revealed by its comparison of qualifications between a later plant superintendent, Mr. McKillop, and Smith. (Pet. App. A-63). This after-the-fact juxtaposition can raise no inference about possible pretext for a 1989 layoff decision

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[8]Because neither of these Thomas' observations could have been observed or known by management before Smith actually began his new assignment, they cannot logically be used to correctly address the pretext issue in making management's earlier decision to select Smith over Tuck. To allow otherwise can only mean that decisionmakers must not only be honest, they must always be absolutely right in their business judgment. The ADEA does not require any such level of business "success."

made before the later decision to close the plant and assign McKillop in 1990 the different role of closing down the plant. (Pet. App. A-101; A-103 - A-105; A-117 - A-119).[9] Without any nexus evidence connecting McKillop with the preceding layoff decision, the Fourth Circuit's juxtaposition is inconsistent with the logic of Burdine because, in this case, it says nothing about management's evaluation of Smith's

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[9]Whatever McKillop's qualifications may have been, it makes no difference insofar as showing pretext for the March 1989 layoff decision, particularly where the record evidence confirms that McKillop's assignment was for a different business purpose, to manage the plant's total shutdown. (Pet. App. A-101; A-103 - A-105; A-117 - A-119):

> Qualification obviously depends on the nature of [the] business at any given time. One year an outgoing business-getter type might be best qualified, while in the next, after the business was got, it might be a cloistered scientist or mathematician. To ignore the shifting nature of qualification from time to time would make the qualification requirement meaning-less. . . .

Kephart v. Institute of Gas Technology, 630 F.2d 1217, 1219 (7th Cir. 1980), (emphasis added), cert. denied, 450 U.S. 959 (1981). See also Dorsch v. L.B. Foster Co., 782 F.2d 1421, 1425 (7th Cir. 1986).

admittedly greater qualifications. Further, such reasoning demonstrates nothing more than the Fourth Circuit belief that a jury should be allowed to second guess the wisdom of Henkel's management decisions, independent of Smith's or Tuck's qualifications at the time the layoff decision was made in early 1989.

C. The Fourth Circuit's Decision Sanctions Juries In "Second Guessing" Employers' Business Judgment Under The ADEA.

The Supreme Court has yet to hold in a discrimination case that a court or jury cannot second-guess an employer's business judgment. Several courts of appeal, however, have endorsed this critical proposition in analyzing summary judgment motions. For example, in Thornbrough v. Columbus & Greenville Railroad Co., 760 F.2d 633, 647 (5th Cir. 1985), the court held:

> Of course, the issue in this case is not whether [plaintiff] or the retained employees were better qualified. The [employer] is entitled to make that decision for itself. The ADEA was not intended to be a vehicle for judicial second-guessing of business decisions, nor was it

> intended to transform the courts into personnel managers.

(citation omitted) (emphasis added).[10] Similarly, in Kephart, 630 F.2d at 1223,[11] another appeals court has recognized:

> The Age Discrimination in Employment Act, however, was not intended as a vehicle for judicial review of business decisions. The question before the court is not whether the company's methods were sound, or whether its dismissal of Kephart was an error of business judgment.

(citation omitted).

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[10]See also Guthrie v. Tifco Industries, 941 F.2d 374, 378 (5th Cir. 1991), cert. denied, ___ U.S. ___, 112 S. Ct. 1267 (1992) (summary judgment affirmed in age case citing Thornbrough); Amburgey v. Corhart Refractories Corp. Inc., 936 F.2d 805, 814 (5th Cir. 1991)(summary judgment affirmed in age case citing Thornbrough).

[11]Other Seventh Circuit decisions have consistently applied Kephart's analysis in summary judgment cases to distinguish between proper and improper evidence of pretext. See McCoy, 957 F.2d at 373 (7th Cir. 1992); Gustovich, 972 F.2d at 848 (7th Cir. 1992); Lindsey v. Baxter Healthcare Corp., 962 F.2d 586 (7th Cir. 1992), cert. denied, ___ U.S. ___, 113 S. Ct. 442 (1992); Mechnig, 864 F.2d at 1365 (7th Cir. 1988); Bechold v. IGW Systems, Inc., 817 F.2d 1282, 1285 (7th Cir. 1987).

Likewise, the Second and Third Circuits have foreclosed lower courts and juries from second-guessing employers' business rationales. See Parcinski v. Outlet Co., 673 F.2d 34, 37 (2nd Cir. 1982), cert. denied, 459 U.S. 1103 (1983) ("The [ADEA] does not authorize the courts to judge the wisdom of a corporation's business decisions."); Healy v. New York Life Ins. Co., 860 F.2d 1209, 1216 (3rd Cir. 1988) ("[O]ur inquiry must concern pretext, and is not an independent assessment of how we might evaluate and treat a loyal employee.")

In opposing summary judgment, Burdine's requirement that a plaintiff produce evidence which raises a genuine issue regarding the employer's specific explanation for a challenged employment decision negates the risk that a jury or court will substitute its judgment for the employer's business concerns. If lower courts are free to rely on any evidence which, for example, may second guess an employer's business rationale underlying an employment decision, summary judgment could

never be granted in discrimination cases. Almost every plaintiff could present evidence that may suggest that a different business judgment could have been made, particularly if--as was done here-- after-the-fact evidence is relied upon. However, the possibility of a different business judgment does not address the central question of whether there is significant and probative evidence that illegal discrimination was involved in a challenged employment decision.

II. THE APPEALS COURT ERRED IN CONCLUDING TUCK'S EVIDENCE CAN SUPPORT A VERDICT OF AGE DISCRIMINATION UNDER RULE 56.

In Liberty Lobby, the Supreme Court made clear that:

> [T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.

477 U.S. at 247-248 (emphasis in original).[12] Uncontradicted

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[12]For a dispute to be "genuine," the evidence must be "such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248. Indeed, such evidence must be "significantly probative." Id. at 249-50. "Only disputes over (continued...)

record evidence confirms that only Sears and McDonald made the management decision to select Smith over Tuck for the reconstituted plant manager position. (Pet. App. A-86; A-98; A-102; A-115 - A-117; A-121). Tuck presented no evidence creating any factual dispute on this threshold point. Thus, for Tuck's evidence to be significantly probative as required by Liberty Lobby, such evidence should involve actions or statements of these two officials, not evidence of non-decisionmakers! See Mechnig, 864 F.2d at 1366 (evidence of pretext requires evidence of actual decisionmakers). Significantly, none of the facts relied upon by the Appeals Court regarding a possible age motivation against Tuck involve either McDonald or Sears.

Examination of the Appeals Court's factual analysis reveals that the court's inference of age discrimination is

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[12](...continued)
facts that might affect the outcome of the suit will properly preclude the entry of summary judgment." Id. at 248 (emphasis added).

unsupported by record evidence. This error is best demonstrated by the Appeal Court's conclusion that Tuck's evidence of a note handwritten by Kahn created a question as to whether Kahn was a decisionmaker in Tuck's layoff.[13]

Notwithstanding the uncontradicted evidence, the court accepted Tuck's "argument" that the phrase "our plan" creates an inference that Kahn participated in a "plan," not only to get rid of Tuck, but to do it because of his age! This doubly speculative argument cannot begin to provide the "significantly probative" evidence required by Liberty Lobby.

Kahn explained, also without contradiction, that his word plan did not refer to any plan directed at Tuck. The

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[13]In reaching this conclusion, the court sidestepped uncontradicted evidence from three witnesses that Kahn was not a decision maker. As a corporate level Human Resource Manager, Kahn explained "I did not make the decision. Human resource people do not make decisions regarding terminations." (Pet. App. A-121). Also, Sears and McDonald, who actually made the decision, both testified Kahn was not a decisionmaker. (Pet. App. A-86; A-98; A-102; A-115 - A-117).

only record evidence about this note clearly explained the meaning of "plan":

> Q What did you mean by "Based on our plans?" What are "our plans?" What does that mean?
>
> A By "our" I guess I meant Henkel's plans. By the time I wrote this note we knew that we had to reduce expenses in the Charlotte area and that we would have to have a reduction in force. And we also knew that there was a possibility that this could affect Mr. Tuck somewhat. It could result in his position being changed. It could result in his termination. That decision had not been made. In light of the fact that his position might go to a different position, I was asking to reconsidering the appropriateness of a salary increase. To me, at this time, was the question. And the "plans" related to plans of reduction in force that could affect many, many people in the organization.
>
> Q Was there any particular plan for Mr. Tuck compared to any other employees?
>
> A No, sir.

(Pet. App. A-122 - A-124) (emphasis added). No evidence contradicts this explanation. Argument alone cannot do it. Where there was no other evidence about the meaning of

"plan" in Kahn's note, the court improperly relied on this note in reversing summary judgment.[14]

Even more important, nowhere in Kahn's note is there any mention of Tuck's age or any age-related factors. Therefore, absent a justifiable inference relating to age, a jury issue arises only if Tuck's argument is accepted as "evidence." Liberty Lobby forecloses that result.[15]

The record evidence also confirms the Appeals Court's error in concluding that Sears' and McDonald's explanation of

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[14]Of course, without a jury issue about Kahn being a decisionmaker, any court's consideration of Heer's alleged influence over Kahn is unfounded. Tuck's argument that Kahn was a decision maker is the only "bridge" which can possibly connect the Fourth Circuit's clear suspicion of Heer's alleged age bias. Without this bridge, Heer's alleged bias (even if true) presents nothing for a jury to consider. See Gunter v. Coca-Cola Co., 843 F.2d 482, 483-84 (11th Cir. 1988), reh'g denied (en banc), 851 F.2d 364 (11th Cir. 1988).

[15]Rule 56(e) makes clear that the nonmoving party ". . .may not rest upon mere allegation . . . . [T]he plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment." 477 U.S. at 256 (emphasis added).

when they decided to include Plaintiff in the layoff was "arguably incredible." (Pet. App. A-73). McDonald and Sears testified that they made the decision shortly before March 1989. (Pet. App. A-98 - A-99; A-111). This uncontradicted record evidence confirms that Sears and McDonald had not made their decision to lay off Tuck when Kahn wrote his note in early January 1989; Kahn's testimony also confirms it: "That decision [to select Tuck for layoff] had not been made." (Pet. App. A-123) (emphasis added). In attempting to contrast the testimony of Kahn with that of Sears and McDonald on this point, the court compounded its error when it observed:

> . . . Kahn stated that he knew that Sears was considering firing Tuck when Kahn wrote the note [in early January 1989]. Tuck argues that this is reason to doubt Sears' and McDonald's story that they were the real decision makers, since they claimed not to have decided to fire Tuck until fully two months later.

(Pet. App. A-59) (emphasis added). Something is missing here! "When" the decisionmakers actually made a final

decision says nothing about whether or not they (or anyone else) were the real decisionmakers.[16] Additionally, Kahn's knowledge about what Sears was considering hardly makes Kahn a decisionmaker. That Human Resource officials frequently are aware of decisionmakers' pre-decision deliberations should not surprise anyone and certainly does not provide a basis for a jury to decide the decisionmakers' motivation!

The Fourth Circuit's strained analysis to find any inconsistency is not supported by any record evidence. That Tuck "argues" for contrary inferences does not make them justifiable inferences. Under Liberty Lobby, Rule 56(e) requires a nonmoving party to come forward with "affirmative

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[16]Kahn's testimony does not say that Kahn knew Sears and McDonald had already made a decision regarding Tuck's layoff. Without evidence establishing this point, the court's conclusion that there is any inconsistency in the evidence is not only entirely speculative, it is wrong! (If there had been such evidence, the court's conclusion might be reasonable.) However, since Kahn's testimony cannot logically be construed to support this premise, the inference necessary for any court to accept Tuck's argument must fail.

evidence,"--not merely conclusory allegations--which is "significantly probative."[17] 477 U.S. at 249-50.

CONCLUSION

The Fourth Circuit's decision reversing summary judgment reflects a pretext analysis incompatible with other circuits, Burdine and Liberty Lobby. Its decision should be reviewed and reversed by this Court.

Respectfully submitted,

HAYNSWORTH, BALDWIN,
JOHNSON AND GREAVES, P.A.

By: James B. Spears Jr.
James B. Spears, Jr.

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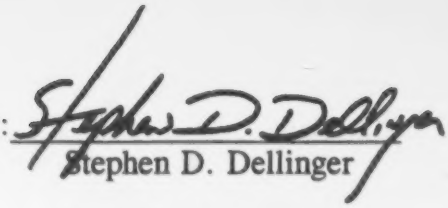
[17]Due to the Petition's page limitation, Petitioner cannot include each example of how the record evidence contradicts the Fourth Circuit's analysis. For example, Petitioner never relied upon a pension cost justification in this case. Nevertheless, for no apparent reason, the Fourth Circuit decided that a "jury should be given the opportunity to consider such a policy as evidence of age discrimination." (Pet. App. A-71).

By: 
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December 1992

Supreme Court, U.S.
FILED
DEC 23 1992
OFFICE OF THE CLERK

92-1103

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

HENKEL CORPORATION,

Petitioner,

versus

ROBERT E. TUCK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX

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*James B. Spears, Jr.
Stephen D. Dellinger
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October 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
CHARLOTTE DIVISION
Docket No. 90-0079-MU
JUNE 10, 1991

ROBERT E. TUCK	)
	)
Plaintiff,	)
	)
-vs-	)
	)
HENKEL CORPORATION	)
	)
Defendant.	)
. . . . .	)

SUMMARY JUDGMENT MOTION HEARING
BEFORE THE HONORABLE GRAHAM C. MULLEN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: Eugene C. Hicks, II
Attorney at Law
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For the Defendant: James B. Spears, Jr.
Stephen D. Dellinger
HAYNESWORTH, BALDWIN,
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Charlotte, NC 28202

[2] THE COURT: Good afternoon. All right. We are here on the matter of defendant's motion for summary judgment in the case of Robert E. Tuck, plaintiff, versus Henkel Corporation. I will hear from the defendant at this time.

MR. SPEARS: Your Honor, my name is Jim Spears, representing Henkel Corporation. Your Honor, very brief background about the material facts in this case that I think may be helpful to put our argument in context. We think the material facts are very short, very succinct.

Number one, it's undisputed that the company had a work-force reduction and reduction in force in March of 1989. The plaintiff, Robert Tuck, was included in that layoff, along with eight other Henkel employees. The decision-makers involved in plaintiff's selection for that layoff were a Mr. Brent Sears and Mr. Neville McDonald. Mr. Sears and Mr. McDonald decided that a technical manager, a Mr. Mark Smith, had greater qualifications for the reconstituted plant

manager position than three other candidates, one of which was Mr. Tuck. Those greater qualifications of Mr. Smith were shown by two very clear and undisputed facts. Number one, Smith's higher educational background in chemistry. Mr. Smith had a B.S. and a Master's Degree in chemical engineering. That's undisputed. It's unchallenged.

Secondly, Smith's extensive work experience at Henkel for 12 years, more than 12 years, where he used that [3] technical training. That's affirmed in Sears' affidavit submitted to the Court.

A key point, Your Honor, on behalf of the defendant is that neither of these two factors, and to the judgment of Mr. Sears and Mr. McDonald regarding these two factors, are disputed by any of plaintiff's evidence. Smith's greater qualifications for the position is in fact the defendant's Burdine explanation. Very clear on that. By the way, we've been very consistent on that. Plaintiff's own testimony, and even the recently submitted Thomas affidavit, presents no evidence

that creates a factual dispute about Smith's greater qualifications. They dance all around that, but they don't touch it. They don't want to touch it. There's nothing they can touch it with. Clearly, the company's explanation under Burdine stands undisputed before this Court today.

The business judgment of Mr. Sears and Mr. McDonald has not been undermined by any evidence. In fact, the undisputed evidence before the Court shows that Mr. Sears and Mr. McDonald had made no negative age comments toward the plaintiff or with regard to any other employee.

In light of those -- and we submit those are the material facts, Your Honor -- in light of those material facts, the question becomes a question of law. Could this Court enter judgment in favor of the plaintiff? Has plaintiff shown enough issues of fact that the Court could **[4]** make reasonable inferences in light of the judgment made by Sears and McDonald that that's not true or that that's a coverup for what

is, in fact, race discrimination. We think that's what the issue here today is.

Now, the plaintiff, of course, doesn't concede all of that and doesn't give up on making other arguments. The plaintiff, of course, has no evidence regarding Smith's qualifications. They dispute Mr. Sears' testimony on that factor. Plaintiff does attempt to focus the Court's attention on other unrelated matters, such as plaintiff's health and other things I want to briefly comment on to the Court. The problem with that effort is that it misses the mark because, under Lovelace in the Fourth Circuit and under Burdine, a plaintiff faced with a legitimate explanation for the employer's conduct, has to address that explanation. You've got to deal with what the employer says. You can't just sidestep it and say, Oh, well, let's talk about something else, and see if we can get the Court or the jury feeling sorry for the plaintiff or making a different business decision. You've got to focus on

what the Burdine explanation is. Lovelace says that. It's implicit and expressed in the Burdine decision also.

Now, plaintiff has hypothesized some other factors. Again, I want the Court to understand that my position is that those factors don't address what the company has already [5] said and is undisputed, but I want to comment on these other factors. He's hypothesized many different explanations for plaintiff's layoff that he would like for the company to have used, rather than the explanation they provide.

First of all, as I have said, plaintiff's health. Plaintiff did indeed have a heart attack in late 1987. The problem the plaintiff has is that the employer's explanation of Smith's greater qualifications does not rely on plaintiff's health. There's no evidence that Mr. Smith or Mr. McDonald said, Oh, Mr. Tuck is feeble. He may not come back from his heart attack. There's just no evidence of that, Your Honor. They are asking for a leap of logic which is not -- no reasonable inference could be drawn from. Even if they did,

Your Honor, this case is not a case under any handicap statute. This is an age case. And while, of course, the company would deny that health played any consideration, it simply is not relevant to an age determination.

Secondly, they hypothesize that there could have been a different business decision made about the employment decision effected here. They argue that the plant that Mr. Tuck worked at, and that Mr. Smith subsequently also worked at, had a lower cost per pound of producing chemicals than did the sister plant also located here on Westinghouse Boulevard. Their problem, again, is very clear. That [6] doesn't address -- nowhere in the company's explanation of Smith's greater qualifications, does the company say, Oh, this plant is less efficient than that plant. It's just not a factor relied upon. The decisions are replete, as I'm sure Your Honor is well aware of them, where many courts have said that it's not the province of a jury or indeed a court or anyone else to second guess management's business decisions. If

management didn't want to consider the cost per pound, there's nothing to compel them to do that. And there's no evidence that they did.

Next, the plaintiff imagines a sinister scheme to get rid of the plaintiff because of his age. Now, this is particularly noteworthy because they rely upon one memorandum, a handwritten note by a Human Resource Manager, regarding a pay evaluation. The memo doesn't even say anything about layoffs or anything like that, but let's engage in some hypothesis here, if you want to. It's a memo handwritten by a Human Resource Manager; not Mr. Sears and not Mr. McDonald, but a Human Resource Manager. And it says, "In light of our plans, is now the time to consider Mr. Tuck for pay evaluation?" That's there, undisputed.

Again, what they miss is there's nothing in that note or Mr. Kahn's testimony about that note, that has anything to do with Mr. Smith or Mr. Smith's greater qualifications. In fact, there's nothing to suggest -- what [7] plaintiff wants to do is

take that word "plans" and bump it up into something sinister and, indeed, speculate and there's nothing, even if there were plans, there's absolutely -- they leave it there. They just want to argue that, Oh, there was this conspiracy. There was this grand scheme between North Carolina and Pennsylvania to get Mr. Tuck. Well, that's a great theory, Your Honor, but there's absolutely no evidence to support that.

In fact, Mr. Kahn, when he was deposed up in Pennsylvania, addressed what he -- he's the writer of the word "plans." He's the writer of that and he addressed what he meant by "plans." The plans were the company's plans to reduce costs down here at the Charlotte facilities. That's want the plans referred to. He was asked, Was this plan aimed at Mr. Tuck or couldn't impact other employees. He said, No. These plans could have impacted many employees. I think it's the phrase that was used. That testimony, Your Honor, is before the Court. It's quoted in our memorandum and before the Court. And that's undisputed. They don't want to hear

that there is a logical explanation for the word "plans." But, again, Your Honor, even if you want to engage in a hypothetical about, Well, there may be something sinister. There may be even something unwise about the company's plans. I'm sure Mr. Tuck and his counsel and possibly some jury members might say, Well, it was unwise to [8] get rid of such experience in running that particular plant at that time. But that's not the question in an age case.

There is just no evidence -- and this is engaging a lot of inferences on behalf of the plaintiff, even if it was sinister -- there's no evidence that any plan had anything to do with age. You have to take a gigantic leap of logic, from the defendant's viewpoint, for anyone to draw any inference, any negative inference, about age there.

Finally, Your Honor, they rely upon the statements of a former supervisor of the plant, a Dr. Heer. And, of course, for summary judgment we have to assume that maybe statements that arguably relate to general statements about a

person's age or getting rid of the young folks -- they are all quoted in the depositions, Your Honor -- we have to engage in the presumption here that those statements might have been made. The problem we've got is, number one, going back to the defendant's explanation, that they didn't rely, that Mr. Sears and Mr. McDonald's explanation is Smith had greater qualifications; the degree, the vast technical experience. They didn't rely upon anything Dr. Heer said about him. In fact, Sears specifically said that -- excuse me, Your Honor -- that the decision, his decision, was not based on his evaluation. At his deposition, Pages 61 and 62.

THE COURT: I will tell you what bothers me about [9] the company's position. In the response to the EEOC, there's a significant number of quotations from Dr. Heer's counseling of the plaintiff --

MR. SPEARS: 86 and previous --

THE COURT: -- memoranda that he is not doing what he's supposed to be doing; that he's not acquiring these

technical skills; that he needs to know more chemistry, et cetera, et cetera. And that, coupled with statements which for purposes of this hearing we have to treat as true, that he said, I'm going to run off -- I'm not going to have any redneck chemists. I'm going to run off the older people. We need young blood, et cetera. To what extent does that present a problem to the Henkel Corporation at this point?

MR. SPEARS: Well, Your Honor, if Mr. Heer were involved in the decision that resulted in the layoff --

THE COURT: Let me rephrase my question. To what extent was Heer's prior activity utilized in making the determination as to who was more technically qualified?

MR. SPEARS: Your Honor, I don't know if this particular testimony is cited to the Court, but I know it's there. When Mr. Sears was deposed, he was asked that, and he emphasized that his evaluation of Mr. Tuck was based upon the one year or around one year that Mr. Tuck was under Mr. Sears. He did not rely upon what Mr. Heer might have

evaluated him. But, Your Honor, I think there's even a legal **[10]** answer to that, and I think it's demonstrated by the Gunter decision that a prior supervisor -- or in the Gunter case it was even the current supervisor. In the Gunter case it was the current supervisor that had written some evaluations. There is nothing in those evaluations that in any way relates to age. But we're not even dealing with a current supervisor here. We're dealing with a former supervisor, not consulted with regard to the decision in 1989. I think those evaluations, the earliest one, was in '87, might have been even going back to '86 with regard to performance evaluations and Sears testified at the time of the transfer when Mr. Tuck was transferred under his authority in 1987, I think, late '86 or early '87, that he might have reviewed those evaluations. But there is nothing that connects up what Sears was aware of and any of these age-based statements. You have to take another leap of inference there that I don't think is justified by anything in the record, Your Honor.

THE COURT: I don't think it's a great leap of faith for the purposes of what we're doing here today to figure if Mr. Heer was prejudiced against this man because of his age and wrote unflattering and unfavorable performance evaluations that impact him because he was so prejudiced that if those unflattering and unfavorable performance evaluations impacted other decisions that were eventually made; didn't that create a problem for your company? **[11]**

MR. SPEARS: Your Honor, I can't cite the particular line of the testimony. My recollection is that Mr. Sears testified that with regard to Mr. Tuck's technical competence that he relies on what he observed during the last year, not anything Mr. Heer had written in any evaluations; like any new supervisor would. I mean, that may be interesting history, but it's nothing that he's going to rely on. Mr. Tuck was under Mr. Sears for the last year or so of his employ. The testimony -- I think I have got a cite to that at Page 30 of Sears' deposition. He says Sears' evaluation of his technical

competence was based on the one year he worked under him, and I know we're submitting portions of the deposition testimony. I'm not sure if Page 30 is there. But I'll be glad to submit that to the Court.

THE COURT: I would like to see it.

MR. SPEARS: But that says what Sears relied upon. The fact that he might have read somewhere a year ago, read an employee's comment about that unless Sears himself was involved or consulted in the decision. Any good supervisor is going to read what's in the personnel file. There's nothing in his evaluations that talk about his age. If the evaluation said, Well, we need to get rid of Tuck because he's too old or because --

THE COURT: No. That's too disingenuous, Mr. Spears. If he's writing bad evaluations because of the guy's [12] age and because he's prejudiced against him because of his age, then the fact that the bad evaluations don't mention his age, is neither here nor there. And I guess that's the one area

of this case that really troubles me because I am -- some of what Mr. Heer said, if true, doesn't bother me. The notation that, Well, we need young blood in the company and things like that. Companies always need young blood in the company. You always need people coming along to replace the people you've got. That I don't -- there's one specific statement in there that Mr. Tuck makes to an effect that the man said -- and I'm going by my memory here -- to the effect that, I'm going to get rid of the older people, or words to that effect.

MR. SPEARS: Which we have to accept on this motion.

THE COURT: For these purposes here today.

MR. SPEARS: Yes.

THE COURT: If that's true and if he acted on that, vis-a-vis, this man and his evaluations, then I'm concerned about how those evaluations may have impacted on the

determination that he was less technically qualified, and I would like you to address that.

MR. SPEARS: Well, my answer is, as I said, the testimony shows what Mr. Sears, in fact, relied upon. He relied upon his own personal experience with Mr. Tuck. **[13]** That's at Page 30 of his deposition. We'll submit that to the Court. Beyond that, Your Honor, I think the Gunter case supports this, and I think Justice O'Connor's analysis in her Supreme Court decision says, those statements by anybody have to have something to do with the decision-making process involved here. Mr. Sears did not testify -- there's no evidence that Mr. Sears relied upon those performance evaluations. And I think they would have to show that reliance before the Court's concern is something that would --

THE COURT: They would have to show some evidence of reliance upon those in order --

MR. SPEARS: Yes.

THE COURT: Okay.

MR. SPEARS: Because I think it's undisputed Mr. Heer was not a decision-maker. They have never challenged that. There's no evidence of that here today.

THE COURT: There's no evidence that he was.

MR. SPEARS: Right.

THE COURT: I'm not concerned about that. I'm concerned about whether, if those statements were made, that -- and assuming that they may have impacted on these performance statements, how those statements got used. And you have explained to me what Mr. Sears said in his deposition. He didn't use them. **[14]**

MR. SPEARS: That he relied upon the technical competence of the plaintiff during the last year. That's what he relied on. Any normal supervisor would. You're not going to rely on some supervisor two or three steps back.

In my conclusion, just to sum up for to the Court so our position is clear, that the company's explanation under Burdine, is that Smith was considered to have the greater

qualifications. I don't think there's any -- they don't dispute that he had a B.S. and the Master's Degree. Mr. Tuck did not. Now, we don't want that to be interpreted, as I think the plaintiff may argue, that we made a degree all of a sudden a requirement of the job. We never made that a requirement of the job. But that doesn't detract from Mr. Smith's greater qualifications. He had that greater qualification. And not only that, he had used that expertise, that B.S. and Master's training, for 12 years in Henkel in the technical area. That's were the management needed some relief. So R & D could do more of its own thing. And that is unchallenged in the record, the explanation there that, for understandable reasons, they want to stay away from that because they recognize they can't get around that.

Plaintiff's hypothetical arguments are not supported by the evidence. There is no direct evidence of discrimination on the part of the decision-makers here, Sears and McDonald. To the contrary, Mr. Tuck himself testified he [15] had never

heard Mr. Sears make any negative statement about himself or any other older employee. Just no evidence at all about that. There's no statistical evidence. Your Honor, they mention an isolated employee, Larry Bingeman, was discharged after he had a heart attack, or Mr. Thomas was laid off two years later when the plant closed down. I'm sure they may argue that that was some evidence of age discrimination. That is not statistical evidence to pull out isolated instances of what happened to these employees. Not enough to overcome the requirements when they are faced with this summary judgment motion. Their circumstantial evidence just doesn't hit the point, and that is the greater qualifications are Mr. Smith's.

THE COURT: Do you wish to reserve a little rebuttal?

MR. SPEARS: Yes, Your Honor. I'm also interested in what Mr. Hicks has to say.

THE COURT: All right. Mr. Hicks.

MR. HICKS: Your Honor, I would first like to say I have brought the depositions down which I do want to be in evidence in full, but the Clerk's Office advised that they would prefer they not be filed unless the Court wanted them filed. But it's up to Your Honor. But I do want them in the event of an adverse decision or appeal or anything like that, I would like it to be known that these will be a full part -- **[16]**

THE COURT: Let's see where we get before we have to do that.

MR. HICKS: But I just wanted to mention that. I do need those in the entirety. And I had mentioned that to Mr. Pulliam, I think, and he said if you needed them, you would call for them. I would just --

THE COURT: Let's wait. Mr. Spears says he's got Page 30 on Mr. Sears. Have you got Mr. Sears' deposition?

MR. SPEARS: Your Honor, I've got that here.

THE COURT: How about handing that up.

MR. SPEARS: This is Page 30 and also Pages 61 and 62 of Mr. Sears' deposition. Just for the record, I'll quote -- I'm sorry, Your Honor. Let me hand that up. We have underscored the portion of that and Your Honor is reminded by Pages 61 and 62 that he was asked whether or not -- Mr. Sears was asked whether or not he based his decision on those earlier performance reviews, and he says, No, sir, he did not. That's on Page 62.

THE COURT: All right, Mr. Hicks, excuse me for interrupting. You may go ahead, sir.

MR. HICKS: Your Honor, to answer a few questions that Mr. Spears has raised, he speaks of Mr. Smith's greater qualifications. Of course, Mr. Smith does have qualifications in that he has a college degree and Mr. Tuck did not. But Mr. Tuck, by the same token, had been plant **[17]** manager for many, many years. I think that --

THE COURT: They say they didn't, but what's to preclude them from determining all of a sudden that having a

B.S. in chemistry is an appropriate qualification for that position?

MR. HICKS: I think that they could do that if the -- if it were not so pretextual. I don't think they should base it solely on that, but I think the big question is not his qualifications, i.e., education, but his qualifications as a plant manager. And obviously, a degree in and of itself would have nothing to do with that. I have put in an affidavit of Mr. Marvin Thomas in which he states that Mr. Smith basically secluded himself in his office, locked -- not locked, but with the door closed, and worked on his computer most of the time and was not even available for questions, even in an emergency, and that he knew little or nothing about plant management.

THE COURT: All that shows is he didn't do as good a job as they thought he would.

MR. HICKS: Well, of course, the courts have said that incorrect decision on the part of decision-makers doesn't

matter, but what I'm saying is that it's pretextual, that that is not why they put Mr. Smith there.

THE COURT: Okay. Let me see if I can get our analytical basis straight. Do you maintain that you have any [18] direct evidence of age discrimination?

MR. HICKS: Yes, Your Honor.

THE COURT: What is it?

MR. HICKS: I say that what you and Mr. Spears were discussing, Mr. Rudy Heer, Dr. Heer's statements, all along to Joe Miller, to Marvin Thomas and to Mr. Tuck, that he didn't want rednecks; that he didn't want older people; he wants younger people there, resulted in the poor performance rating that he gave to Mr. Tuck. We know that Mr. Sears, right before the salary review that's in question here in January of '89, gave him a three or fully satisfactory rating. So we know that Sears said his rating was fully satisfactory. He supposedly is the decision-maker, although I don't think that's true. But Mr. Carlin, the Human Resources Manager

of Organic Products Group, said in his deposition, Pages 61 and 62, that he had known Dr. Rudy Heer since 1985; that they most likely had discussed Mr. Bob Tuck's performance on many occasions before March 1, 1989, and that Dr. Heer had told him that he did not want Mr. Tuck as plant manager any longer at the Sugar Creek facility in Charlotte.

Now, I say, Your Honor, that Human Resources made this decision, not Mr. Sears and not Mr. McDonald.

THE COURT: What's your evidence of that?

MR. HICKS: My evidence of that is the merit **[19]** increase that was discovered in March that's attached to my response and is attached to these depositions. The defendant says that Mr. Sears and Mr. McDonald made this decision. Both of them were deposed. They both said they made the decision just before March 1. They said they then advised Human Resources of that decision. Yet, we know that there was a salary review coming up for January 1, 1989. He was terminated March 1, 1989. That came out in December. It

came down the line from Human Resources in Ambler, Pennsylvania. It came to Mr. Schubert, who was a Charlotte manager of Human Resources, who took it to Mr. Sears; Mr. Sears -- well, there was testimony that prior to one of those coming out, you have to approve it to be sure there's money in the budget for it and it's satisfactory performance. Everything was approved and it went on to Human Resources, came back down the line in a computer printout to be effective January 1, 1989, raising Mr. Tuck's salary. And we know that Mr. Sears, as his superior, wrote on the approved line, his signature. Mr. Schubert, December 22nd, I believed it was, '88, approved it for personnel in Charlotte, and sent it back to Ambler to be implemented, to Mr. Carlin's office. Then we know that on the back in handwriting is, Confidential from Kahn to Schubert: In view of our plans, suggest that you, in effect, not raise this salary or reconsider this salary increase.

[20] Now, Mr. Spears says there's no evidence that had to do with age or termination or anything of that nature, but Mr.

Kahn said in his deposition that he thought or knew that Mr. Tuck would be in consideration for cost-saving reduction down there and how in the world the defendant can contend that Mr. Sears and Mr. McDonald made this decision just short of March and yet Human Resources already knew what this decision was going to be in December or January is beyond me. And that -- Your Honor, you don't have to have direct evidence; you can have circumstantial. And, surely, the result, looking backwards when Mr. Tuck was terminated, when there was a pattern according to Mr. Thomas and Mr. Tuck and the facts, that older people do not make it in Henkel Corporation --

THE COURT: You're going to have a -- if you get through today, you're going to have a lot of trouble putting that into evidence unless you're proffering me some proper statistical evidence.

MR. HICKS: Well, I don't know. Be that as it may, the evidence here is that that is what the case was, that very

few, even personnel, Human Resources, couldn't name anyone who had gotten to the normal retirement age of 65; not even one person, and named three who got to 62. I mean, statistics is zero on a, quote, normal retirement age.

But in any event, he was let go March 1. Now, they **[21]** told him why they were letting him go. They said the work-force reduction for economic reasons, but he was at the Sugar Creek plant and we have put in evidence in the depositions and so on that there was no problem with money at Sugar Creek. Everything there was the lowest cost per pound, very efficient, everything fine.

THE COURT: Where is your evidence that the cost per pound calculation at Sugar Creek was made on the same basis as the cost per pound at Westinghouse.

MR. HICKS: It would be Mr. Tuck's testimony.

THE COURT: Where did he say that in his deposition?

MR. HICKS: Well, I thought he had, Your Honor. There's testimony that Ambler had directed Westinghouse to use the same method that all the other plants used for cost per pound. That's my understanding and that even Mr. McDonald said that he disagreed with that, but that they had to do it. I think that's what the testimony was.

But, in any event, the cost per pound, these are figures that I tried to get them in discovery and the Court didn't allow that. But it came in in the deposition, all the depositions, of cost per pound and, while Mr. Kahn, I think tried to state that that was apples and/or oranges; nevertheless, that's the figures that were coming in as cost per pound that Henkel was using. But in any event, they go **[22]** on to say that we say health -- they say his health was not relevant and they have quoted some cases as saying that you can let someone go due to their health. But here they are not contending they let anybody go due to their health. It just so happens, and I think --

THE COURT: No, they are contending that his health is irrelevant. It seems to me that it is. You're trying to say that the fact he experienced an episode of ill health is evidence of some improper age discrimination on their part. But if they haven't contended that his health had anything to do with their determination, why is his ill health anything to do with --

MR. HICKS: Well, Your Honor, that's why it's pretextual, because they are saying they made it on strictly business reasons. I'm showing that two months earlier personnel says, We have a plan. Don't raise his salary. He has just experienced a heart attack. Mr. Kahn said he knew he had had a heart attack. I'm saying that a jury or anyone can easily see that that is a factor of a man who is just short of 60 who has a heart attack, albeit, not a particularly bad one, that we are going to let this man go. In fact, they did let him go.

THE COURT: Well, suppose you establish that the proffered reason is a pretext and the real reason is because he

had a heart attack and they are worried about his health; [23] have you proved a case of age discrimination?

MR. HICKS: I think you would have because they are saying it is not due to his heart attack. You could not do it if it were due to his heart, period. I think for health, you can let the man go, but I don't think you can say we didn't do it due to that and they do it due to age where heart attack simply triggers this thing, that we had better hurry because he's getting old and now he's getting sick. I think it's a matter of semantics.

THE COURT: I don't. If they had come right out and said you've had a heart attack and we don't want you dropping dead on our plant floor. We're sorry, but your health is too poor to keep around.

MR. HICKS: They could do that.

THE COURT: They could do that.

MR. HICKS: But they didn't do that.

THE COURT: If they cushioned the blow by saying, Well, we're having a reduction in force, but it's really because your health is poor, I don't think you have proven anything.

MR. HICKS: But they haven't done that. They are never going to say it's due to your age. No company is going to document and say it's due to your age. But what they are saying is reasons that are not true. They are saying it's to save money. I have shown they haven't saved a dime. They [24] have increased money, put a man -- and raised actually from Tuck's 48,000 to 53,000 -- put a man on the payroll at Westinghouse who wasn't on the payroll at Westinghouse. Of course, they have had to let go of operators because they went from a seven-day week to a five-day week, but they don't have to let go a manager because it takes a manager to manage this plant and a manager to manage whether you're on a five-day work week or seven. They did what they did to others, the security guard, operators, because they had to.

THE COURT: So you contend then that the direct evidence that you have age discrimination in that Heer, poisoned the well with Mr. Kahn; that Heer had made statements to your client about age and that that is the explanation for what Mr. Kahn's plans are and that is an appropriate inference for the jury to draw?

MR. HICKS: Well, it's more than that. He also talked to Sears. Every time he would come over, he would talk to Sears, Dr. Heer, about Mr. Tuck. Also, Mr. Sears had told Mr. Tuck that if this plant is closed, you will have a job at Westinghouse, If there's nowhere else, you will be able to work here at Westinghouse. So we know that Mr. Sears had in mind, or at least there is evidence that Mr. Sears had in mind, keeping Mr. Tuck. So it wasn't a matter of Mr. Sears wanting to get rid of Mr. Tuck, but this came down from Human Resources, to reconsider it, and there had to be some [25] reason to reconsider. And I have gone through my mind, is there any other possible reason they could have let Mr.

Tuck go. I think we have refuted costs. I think we have refuted this change of duties as plant manager. In Mr. Marvin Thomas' deposition he says there was absolutely no change of what Research and Development did under Tuck, under Smith, under McDonald there was no difference in the new products that they had and Mr. Smith didn't take part, to speak of, in the plant. So I think that needing to go with someone with a degree is totally pretextual, not true. So although they have extended the reason on and on from what they first said, I think we have rebutted every one, shown it's pretextual, shown that the jury could easily find from the evidence that it was not Sears and McDonald who made the decision; it was Human Resources, and that they based it on age and --

THE COURT: Okay. I've got to tell you, I get confused because when you tell me you have -- I'm trying to break this down in the way you have it. It's either direct evidence, indirect, i.e., circumstantial evidence, or whether

you're relying on McDonnell Douglas to get to the jury. Because your pretextual --

MR. HICKS: You can use both.

THE COURT: I understand you can use both. But your pretextual analysis seems to me to lie in the nature of McDonnell Douglas in attempting to refute their proffered [26] reasons, and I'm having trouble separating out what your contentions are. When you say you have got direct evidence and then you keep using the word pretext, so I'm having a little trouble sorting that out.

MR. HICKS: Well, I think there's direct evidence on every point, except I think you have to draw from circumstantial to say that it was age in that there is no direct evidence that we terminated this man due to age without going back to Dr. Heer who was certainly biased due to age and shows that all of that is direct that he talked to the head of personnel and said, I don't want this man. That he made his performance report, that Mr. Sears has seen those, that he had

talked to Mr. Heer. Dr. Heer was head of Research and Development. You put all of those facts together and I think it's very easy to draw from those facts the circumstantial evidence that these factors of age, which are facts, were the determining factor, plus I think having the heart attack precipitated it at that point; and that personnel decided we certainly want this salary reconsidered because it certainly would look odd to have an increase in salary with a three, totally satisfactory rating, two months before this man is let go. And I think it is for the jury as to how in the world personnel would know he was going to be let go before the company's decision-makers ever knew it themselves. [27]

THE COURT: But that's an inference you ask to be drawn from words which have any number of potential explanations, including the one which Mr. Kahn gave.

MR. HICKS: You mean the explanation due to cost?

THE COURT: That they planned to do a reduction-in-force in Charlotte and that Mr. Tuck may or may not be one of the people affected by the reduction in force.

MR. HICKS: But, you see, nobody has ever said there was going to be a reduction-in-force.

THE COURT: Mr. Kahn did in his deposition.

MR. HICKS: Well, the, quote, "decision-makers" didn't say that. The only evidence back in 1988 was that there was going to be a reduction from seven days to a five-day work week and Mr. Kahn could perhaps have known that some operators were going to have to go. If you're cutting back a big plant to five days -- but I don't think there is any evidence that there is going to be a managerial shakeup, much less why Sugar Creek, which is an entirely different manufacturing plant, entirely different, why that would be involved in a Westinghouse reduction. And Mr. McDonald said even there was no talk about reduction-of-force, only

Westinghouse was the only thing considered as to reduction and that was the seven to five days.

I think there's plenty of evidence, Your Honor. I know it's up to you and I submit to you, but I think **[28]** there's plenty of evidence to go to the jury of age discrimination in this case. And, clearly, rebuttal of the reasons given for this decision. In fact, even rebuttal of who made their decision and I can't explain that. You ask for anything in writing and nothing is produced two times and then you find this confidential note, that it's got to have some significance coming from personnel two months before any decision supposedly had been made. I could go through a lot of the facts here, but I think you know what's in these memos, and I just feel very strongly that we have carried that burden.

THE COURT: All right, sir. Mr. Spears.

MR. SPEARS: Your Honor, very briefly. First of all, the last little jab about this confidential note not being produced earlier; the question was, as I recall it, whether there

was any writing about the decision being made. This note obviously didn't involve the decision being made. It wasn't by Sears or McDonald or either one of those and it was in the personnel file.

So putting that little jab aside, let me deal with the following up with the Court's question with regard to whether or not Mr. Sears placed any reliance upon Mr. Heer's previous earlier written evaluation. He was asked that question at Page 61 of his deposition on Line 18. The question is: "Did you and Mr. McDonald base Mr. Tuck's termination on any **[29]** of the performance reviews given by Dr. Heer?" "No, sir."

"You have never seen them at that time?" Of course he had previously testified he had seen them at the time the employee was transferred to him. He testified he had seen them.

"Was your decision based on those reviews?" "No, sir." I apologize for not having this in our earlier submission,

but I think that clearly separates anything Dr. Heer may have thought or may have wanted with regard to Mr. Tuck. There's no evidence he was a decision-maker. All the evidence before the Court was Sears and McDonald and not even an issue about that. Even Mr. Kahn and Mr. Schubert testified they were not. They were not decision-makers. They were logical to be consulted, but not the decision-makers. That's absolutely consistent and undisputed in this record.

Your Honor, I need to comment on direct evidence. As I recall, what the Supreme Court and other courts have said about direct evidence; direct evidence is where you don't have to make an inference from the evidence. The evidence kind of speaks for itself. You don't have to draw any meaning out of it. For example, if Mr. Sears or Mr. McDonald, if there was any evidence that one of them had indicated some age bias toward Mr. Thomas, like when Mr. Sears notified him of his layoff, you know, Mr. Tuck, I just **[30]** think

you're too old to stay around here. You know, that would be direct evidence. Nobody needs to interpret that.

Your Honor, there absolutely is no direct evidence. The direct evidence with regard to Sears is, from Mr. Tuck himself, that he had never heard Sears make any statement relating to his age or any other employee's age. Now, that's the direct evidence which supports us. It doesn't create any issue of fact. While the plaintiff's counsel may want to debate that in front of the jury, that's not the issue here today. It's whether or no there's any direct evidence. There is no direct evidence with regard to the decision made by Sears and McDonald in 1989. I want to make sure the Court understands our position on that. There's no statistical evidence, Your Honor; there's just none at all. The fact that Mr. Thomas put in an affidavit about his own situation which occurred two years after the fact, which was involved with the plant shutdown, not a work-force reduction, you know, it's just an isolated incident. One person is not a statistic.

With regard to circumstantial evidence, it's got to be circumstantial evidence from which an inference about the decision-makers can be raised, and that is Sears and McDonald here, and there's just no evidence that relates to those two people. Now, I risk to make Mr. Kahn to be the bad guy and he keeps going back to this plan or this secret memorandum, **[31]** Your Honor, and we anticipated that and he quoted Mr. Kahn's testimony at Pages 116 and 117, Your Honor. It's quoted on Page 11 of our memorandum which we delivered to the Court last Friday. We asked about this plan and I want to quote it to remind the Court of it. It says, "By the time I wrote this note, we knew that we had to reduce expenses in the Charlotte area." There's nothing there about the employee having had a heart attack and not being able to come back from that. It's about expenses. The Court already noted that.

The next paragraph I think is important. "We also knew that there was a possibility that this could effect Mr. Tuck somewhat. It could result in his position being changed;

it could result in his termination. That decision had not been made." Your Honor, it's misleading, in my opinion, to say, How can Mr. Kahn have known about the decision when his own testimony said the decision had not been made. There is just no decision to know about. And that's undisputed. Sears and Neville McDonald testified without contradiction the decision was made sometime in late February. There was no decision to communicate to Mr. Kahn and he said he wasn't aware of any decision.

So, Your Honor, I have a hard time accepting that as staying with the facts because those are the facts before the Court; not some hypothetical version of the facts that [32] the plaintiff or his counsel may want to hypothesize about. Your Honor, if Mr. Hicks or Mr. Tuck or you or I might have been in charge of running these two facilities in 1989, I would submit we might have made a different decision. We might have made even a better decision. We might have made more money for Henkel rather than the decision that was made.

That is certainly not the issue here whether it's based on cost per pound or you know the decision that was explained without contradiction is that Mr. Smith, among the four candidates who were evaluated, had the greatest technical competence. That's undisputed, Your Honor, and that's not only undisputed, it's not challenged.

They point to Mr. Thomas' evidence. Your Honor, I think there's something real curious about Mr. Thomas' affidavit, but I understand it. Mr. Thomas' twist on anything that has to do with Mr. Smith, number one, these are after-the-fact observations about what happened after the layoff, but beyond that, I think the way he words his affidavit is real significant because he says, I'm not aware or I'm unaware. Well, Your Honor, as a federal judge in South Carolina told me one time when I was cross-examining the witness and eliciting, that same kind of testimony, he said, Mr. Spears, you can fill up the ocean with what this witness may not know. What the witness may not know doesn't establish that

the opposite was true. Mr. Thomas wasn't the [33] only person that was in a position to observe anything. In fact, I think this is significant, he testified that Mr. Smith stayed behind closed doors and did all his work. I think that's satisfactory. He wasn't in a position to know what his position was, good or bad, and I think it is -- I don't think it's in dispute Mr. Thomas was such a subordinate employee, somebody in a superior position with Mr. Smith that would be in a position of knowing what Mr. Smith was supposed to be doing.

Your Honor, just some minor points about that. One employee was added, Mr. Horton was added to the Westinghouse payroll. Neville McDonald testified, and I will submit this to the Court because it's undisputed, that only a portion of Mr. Horton's salary was added to the Westinghouse payroll, not his entire salary. He points out, Mr. Smith was given an increase, Your Honor. Well, of course, when employees are reduced in number, when you -- over what his

prior salary was, there is still a net savings in payroll cost there, Your Honor. There is no negative inference from the fact somebody else got an increase.

Your Honor, in closing, the testimony or the argument that there was no problem at Sugar Creek compared to Westinghouse again goes to the business judgment of who is going to run the business. There's no testimony from the decision-makers that one plant was better than the other one **[34]** or, even if they were, that that had anything to do with the decision. They reduced one man; they reduced management; they selected the one who was Mr. Smith because of the greater qualifications. And, Your Honor, the mere possibility that there could be different, multiple different explanations for this, doesn't mean that age was the explanation.

The Courts have said very clearly in Lovelace, the Fourth Circuit I thinks says in Lovelace, that a jury is not -- it is not proper for the jury to just be allowed to roam the field

to come up with some sort of possible explanation. There's got to be some logical, reasonable inference as I said in the beginning of my argument that the Court should decide today, based on the evidence, would it be appropriate for judgment to be entered for the plaintiff and if the leap of logic is too great and I think particularly the Court is concerned about Dr. Heer's statement, and I think that's answered by Sears' deposition, but I think any inference beyond that is clearly speculation. In fact, I think it goes against the evidence that Sears and McDonald -- there is no evidence of any negative age consideration by them. That's all I've got.

THE COURT: Mr. Hicks, do you want about five more minutes?

MR. HICKS: I will leave it up to the Court.

[35] THE COURT: Very well. It appears to the Court that there's no forecast of direct or indirect evidence and that we're proceeding under McDonnell Douglas. The defendant has proffered an explanation that there was a reduction in force.

It's clear from the evidence that there was a reduction in force. The people who made the decision have stated that they made an independent determination that the man who was retained had better technical qualifications than three others. The plaintiff is required to adduce or forecast evidence that attacks that and represents that the proffered explanation is but a prediction and that, but for his age, he would have been retained.

Although I have some concern about the statements that Dr. Heer made, it's also true that Dr. Heer noted from time to time concerns about the technical qualifications of this man, which are age neutral and ultimately an age-neutral explanation has been given which the plaintiff has failed to overcome and I will, therefore, grant the motion for summary judgment upon reasons stated in open court.

Mr. Hicks, you will be permitted to place those affidavits into the record for purposes of your appeal. Thank you, Gentlemen. We stand in recess.

(END OF PROCEEDINGS)

* * * * * * * * *

IN THE DISTRICT COURT OF THE
UNITED STATES
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
CHARLOTTE DIVISION
No. C-C-90-0079-MU

ROBERT E. TUCK,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	ORDER
HENKEL CORPORATION,	)	
	)	
Defendant.	)	

This matter is before the court on motion of defendant for summary judgment. The parties have fully briefed the motion, and the case was called for hearing at 2:00 P.M. on Monday, 10 June 1991. Pursuant to a ruling from the bench granting summary judgment and for the reasons stated in open court, summary judgment will be granted.

IT IS THEREFORE ORDERED that summary judgment in favor of the defendant is granted.

This 10th day of June, 1991.

s/
GRAHAM C. MULLEN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NORTH CAROLINA

JUDGMENT IN A CIVIL CASE

CASE NUMBER: C-C-90-0079-MU

ROBERT E. TUCK

v.

HENKEL CORPORATION

This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Judgment is hereby entered pursuant to Final Order the Court filed on the 11th day of June, 1991.

June 11, 1991
Date

/s/ THOMAS J. MCGRAW
Clerk

/s/ Cindy Seagrave
(By)Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ROBERT E. TUCK,	)	
	)	
Plaintiff-Appellant,	)	
	)	
	)	
v.	)	No. 91-2591
	)	
HENKEL CORPORATION	)	
	)	
Defendant-Appellee.	)	
	)	

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte.
Graham C. Mullen, District Judge.
(CA-90-79-C-C-MU)

Argued: March 5, 1992

Decided: August 25, 1992

Before ERVIN, Chief Judge, PHILLIPS, Circuit Judge, and MURRAY, Senior United States District Judge for the District of
Maryland, sitting by designation.

Reversed and remanded by published opinion. Chief Judge Ervin wrote the opinion, in which Judge Phillips and Senior Judge Murray joined.

COUNSEL

ARGUED: Eugene C. Hicks, III, Charlotte, North Carolina, for Appellant. James Bernard Spears, Jr., HAYNSWORTH, BALDWIN, JOHNSON & GREAVES, P.A., Charlotte, North Carolina, for Appellee. **ON BRIEF:** Stephen D. Dellinger, HAYNSWORTH, BALDWIN, JOHNSON & GREAVES, P.A., Charlotte, North Carolina, for Appellee.

OPINION

ERVIN, Chief Judge:

Robert E. Tuck filed an action in the Western District of North Carolina against Henkel Corporation alleging that he was discharged in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621-34 (ADEA or "the Act"). The district court entered summary judgment against Tuck. We reverse.

I.

Henkel manufactures and sells specialty chemical products for various business applications, primarily for the textile and paper industries. Henkel is a German-owned company that has its home office in Dusseldorf, Germany, and owns 24 facilities in the United States. Henkel's operations in Charlotte, North Carolina included two manufacturing facilities, one on Westinghouse Boulevard and the second on Sugar Creek Road. Tuck worked for Henkel's Sugar Creek plant for 14 years, the last 12 as Plant Manager.

Tuck was discharged on March 1, 1989, when he was 59 years old, even though he was working in a fully satisfactory manner according to his supervisor, Brent Sears. Tuck had suffered a mild heart attack on December 17, 1989, although Henkel does not contend that Tuck's health had anything to do with his dismissal. Henkel replaced Tuck as Plant Manager with a younger man, Mark Smith, who was then 37 years old.

According to Henkel, Neville McDonald, Henkel's Vice President of Manufacturing Engineering, Organic Product Group, and Sears, who managed both Charlotte facilities and had supervised Tuck since 1988, decided on their own to dismiss Tuck immediately before March 1, 1989. They needed to cut costs in their Charlotte operations because of a reduced need for chemicals from the two plants, and accordingly reduced the manufacturing schedule at the Westinghouse plant from seven to five days a week and laid off eight Westinghouse employees. Henkel's Textile Chemical Research and Development Group (R&D Group), headed by Dr. Rudy Heer, was responsible for new product development. According to Henkel, its Sugar Creek plant relied on the R&D Group for technical assistance in day-to-day manufacturing operations; this time spent on technical assistance reduced the amount of time the R&D Group could spend on new product development and was costly. McDonald and Sears contend that they wanted the Sugar Creek Plant Manager to take on the

R&D Group's technical support responsibilities. McDonald and Sears state that they considered four candidates, including Tuck, on the basis of Technical ability and job performance for this new reconstituted, Plant Manager position. They selected Smith, who had Bachelor of Science and Masters degrees in chemical engineering as well as technical experience with Henkel. Tuck, on the other hand, had only completed his general equivalency degree for high school and one year of technical college, although he also has approximately 30 years of experience, often as a plant manager, in various chemical manufacturing companies.

Tuck tells a different story. He contends that Heer, who supervised Tuck for the two years before Sears, was an age-biased individual who discriminated against Tuck by giving him unjustly poor evaluations. Tuck stated in deposition that Heer repeatedly said to him that Heer wanted to get rid of the older people and replace them with "young blood." J.A. 101. Marvin Thomas, who was Superintendent

of Production and Warehouse at the Sugar Creek plant, also stated in an affidavit that Heer had pointedly stated to several older employees, including Tuck, that what Henkel needed was "younger people." J.A. 323.

Tuck contends that Robert Kahn, Director of Human Services in Henkel's United States headquarters in Ambler, Pennsylvania, was the real decision-maker in his dismissal, and that Kahn was influenced by Heer in making his decision. As evidence that Kahn made the decision, Tuck points to a handwritten note labelled "confidential" by Kahn to his subordinate, Michael Schubert, Human Resources Manager in Charlotte, written in late December 1988 or early January 1989. This note responded to Sears' and Schubert's suggestion that Henkel increase Tuck's salary from $48,600 to $50,060 per year. The note stated, "Based on our plans I would ask you and Brent [Sears] to reconsider the appropriateness of a salary increase." J.A. 188. Tuck reads "our plans" to refer to Kahn's decision to fire Tuck based on

Heer's recommendation and make it appear that the reason for Henkel's Charlotte reduction-in-force. Henkel contests this reading, arguing that "plans" mean nothing more sinister than the general force reductions. In support of his reading. Tuck points out that Kahn stated that he had spoken with Heer several times about Tuck and that Heer did not want Tuck to continue as Plant Manager.[1] Also, Kahn stated that he knew that Sears was considering firing Tuck when Kahn wrote the note. Tuck argues that this is reason to doubt Sears' and McDonald's story that they were the real decision-makers, since they claimed not to have decided to fire Tuck until fully two months later. Tuck also points out that Sears had told Tuck that Henkel would continue employing Tuck even after it closed the Sugar Creek plant[2] because he was doing such a

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[1]Sears had also seen Heer's performance reviews of Tuck and Heer and told Sears that he was unhappy with Tuck's technical competence.

[2]Henkel closed the Sugar Creek production facility entirely in April 1991, transferring several workers from the

(continued...)

good job and that Sears approved two salary raises for Tuck--not, Tuck argues, the words and actions of a man soon to decide to fire Tuck. Finally, Tuck notes that McDonald and Sears have no written memoranda or communications with Personnel backing up their story; their recollections of the procedures used to select Smith are hazy at best.

Tuck also presents anecdotal evidence that Henkel discharges employees because of their age. Tuck provides the examples of several older employees who were fired, and Thomas, Superintendent of Production at Sugar Creek, states in his affidavit:

> It has been apparent for many years to anyone employed by Henkel for a considerable length of time that the corporation has a policy of terminating its employees as they become

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[2](...continued)
manufacturing division to other facilities but keeping the manager who had previously replaced Smith on the Sugar Creek payroll.

> older, generally before reaching age 55 and certainly before age 60, and thus before higher monthly payments have become payable under Henkel's retirement plans....

J.A. 323. When questioned at deposition, Kahn could name but one Henkel employee who was still working at age 65, the normal retirement age according to Henkel's retirement plan. That employee was the president of a company that Henkel had acquired, who retired at age 65. In addition, Kahn could remember only one managerial employee who retired after age 62, and he was a vice president.

Finally, Tuck attempts to rebut Henkel's asserted rationale for discharging him. Tuck contends that Henkel did not fire him to keep the R&D Group out of day-to-day operations to save money and develop new products. According to Thomas' affidavit, Smith, Tuck's replacement, had no experience in running a chemical plant, no knowledge

in altering chemicals, and refused to be bothered with questions about chemical production. Furthermore:

> I know of no change whatever that took place with respect to the Research and Development staff or chemists spending more or less time in assisting with our production of chemicals at Sugar Creek under Bob Tuck as Plant Manager, under Mark Smith as Plant Manager, or under Tom McKillop as Plant Manager. It had always been rare that anyone from R & D ever had anything to do with production after R & D developed and released a new product for production. R & D was called to the same extent if a problem developed under Mr. Tuck, Mr. Smith, and Mr. McKillop, up until production was decreased on closing the plant. I also am aware of no increase in the development of

> new products by R & D during the time Mark Smith was Plant Manager. As I was Superintendent of Production, I was in a position to know the foregoing things.

J.A. 324. In addition, McKillop, Smith's replacement as Plant Manager at Sugar Creek on August 1, 1990, had a technical competency much the same as Tuck's.

After discovery, Henkel moved for summary judgment. The district court entered judgment against Tuck following a hearing on June 10, 1991. Tuck timely appealed.

II.

Summary judgment is appropriate in those cases where there is no genuine dispute as to a material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). We must draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion. Matsushita Elec. Indus. Co. v.

Zenith Radio Corp., 475 U.S. 574, 587-88 (1986). Summary judgment is appropriate only where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986), such as where the non-moving party has failed to make a sufficient showing on an essential element of the case that the non-moving party has the burden to prove. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). We review summary judgments de novo. Higgins v. E. I. Du Pont De Nemours & Co., 863 F.2d 1162, 1167 (4th Cir. 1988).

Under the ADEA, it is unlawful for an employer to terminate an employee on the basis of the employee's age. 29 U.S.C. § 623(a)(1). The substantive elements of an ADEA claim are that (1) an employee covered by the Act (2) has suffered an unfavorable employment action by an employer by the Act (3) under circumstances in which the employee's age was a determining factor in the action in the sense that but for the employer's motive to discriminate against the employee

because of the employee's age, the employee would not have suffered the action. *Fink v. Western Elec. Co.*, 708 F.2d 909, 914 (4th Cir. 1983). An employee can prove that age was a determining factor in an ADEA-prohibited employment action (1) under ordinary principles of proof using any direct or indirect evidence relevant to and sufficiently probative of the issue, or (2) under a judicially created proof scheme originally used in the Title VII context in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) and subsequently adapted for use in ADEA cases. See Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 239 (4th Cir. 1982).

Although Tuck argues that his case may be analyzed in either fashion, it is examined most profitably for him in the latter manner. Applying the factors set forth in *McDonnell Douglas*, the employee must first establish a *prima facie* case of age discrimination by showing that (1) he is a member of the protected age group (between 40 and 70, 29 U.S.C. §

631(a)); (2) he was discharged or demoted; (3) at the time of discharge or demotion he was performing his job at a level that met his employer's legitimate expectations; and (4) following his discharge or demotion, the plaintiff was replaced by someone of comparable qualifications outside the protected class (See EEOC v. Western Elec. Co., 713 F.2d 1011, 1014 (4th Cir. 1983). Such a *prima facie* case creates only an inference of age discrimination, which the employer can then rebut by presenting legitimate, non-discriminatory reasons for the termination. *McDonnell Douglas* 411 U.S. at 802; Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577, (1978). If the employer rebuts the employee's inference of age-based discrimination, the employee can still prevail by demonstrating by a preponderance of the evidence that the defendant's proffered reason was a pretext for discrimination. Burdine, 450 U.S. at 252-53. To make this demonstration, the employee must show that as between the plaintiff's age and defendant's explanation, age was the more likely reason for the

dismissal, or that the employer's proffered explanation is simply "unworthy of credence." Id. at 256; EEOC v. Clay Printing Co., 955 F.2d 936, 941 (4th Cir. 1992). The burden of persuasion remains with the plaintiff throughout. *Burdine*, 450 U.S. at 256.

The court below briefly considered the *McDonnell Douglas* scheme, but ultimately found that it was of no help to Tuck. *See* J.A. 52. Considering all facts in a light most favorable to Tuck, as we must in reviewing the grant of summary judgment against him, we are compelled to disagree. First, Tuck has made his *prima facie* case based on undisputed facts. He was a member of the protected age group, since he was 59 years old when he was fired. According to his supervisor, Sears, Tuck was performing in a fully satisfactory manner at the time he was let go. Finally, Tuck was replaced as Plant Manager by a younger person with comparable qualifications to manage the plant, the 37-year-old Smith.

Henkel claims and the district court stated in its disposition from the bench that this is a force reduction case and not a firing-and-replacement case. We do require that plaintiffs meet a somewhat different burden in establishing their *prima facie* case in force reduction cases.[3] However, in this case it is uncontradicted that the Plant Manager position remained and that Smith replaced Tuck in it. As a result, the force reduction cases do not bear on Tuck's requirements in establishing a *prima facie* case. Henkel's claim that it added responsibilities to Tuck's position as part of a general reduction-in-force, thus making Tuck unqualified for the reconstituted position, is only relevant to the parties' rebuttal opportunities.

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[3]In force reduction cases, rather than showing that the plaintiff was replaced by a younger person, the plaintiff must show that "persons outside the protected age class were retained in the same position or that there was some other evidence that the employer did not treat age neutrally in deciding to dismiss the plaintiff." Herold v. Hajoca Corp., 864 F.2d 317, 319 (4th Cir. 1988), *cert. denied*, 490 U.S. 1107 (1989); see also Western Elec., 713 F.2d at 1014-15.

The court below determined, correctly, that Henkel met its rebuttal burden of presenting legitimate, non-discriminatory reasons for the termination--needing a technically proficient manager to relieve pressure on the R&D Group. It is undisputed that Smith had better technical credentials than did Tuck.

Finally, the court determined that Tuck did not meet his burden of showing that Henkel's asserted reason was a mere pretext for discrimination. It is at this stage that the court implicitly, and wrongly, weighed the evidence to Tuck's detriment. First, having the benefit of all permissible inferences, Tuck has shown that Henkel's rationale is unworthy of credence. Thomas, who as long-time Superintendent of Production would be in a position to know, states in his affidavit that the R&D Group was rarely involved with the plant's activities once it developed new chemicals. If this is true, then it is unlikely that Henkel would have needed to alleviate the pressure on the R&D Group by consolidating

the manager and technical positions. Henkel is correct in pointing out that what is important in ADEA analysis is the employer's reasons for dismissing the employee at the time the decision is made, not what might have transpired afterwards. Even so, it is relevant to consider in assessing the credibility of Henkel's story that, believing Thomas as we must, after the R&D Group was relieved of the "burden" of supporting a technically deficient Tuck it helped the plant no less than before and the number of new products it developed was no greater than previously; Smith was replaced by someone with no more technical background than Tuck had; and Smith was a poor manager with little knowledge of or interest in running the plant. While these facts might simply be the result of what may be in 20-20 hindsight have been a poor business decision by Henkel, they might equally suggest that Henkel's story is false. It is the place of the jury, not the court, to make this choice.

Tuck has presented sufficient evidence to create a material dispute as to whether age is a more likely reason for his dismissal than Henkel's asserted reason. He has presented strong anecdotal evidence (which he may be able to develop into statistical evidence for trial) that Henkel fires its employees before they reach retirement age. Indeed, Kahn could remember but two Henkel employees who reached age 62--supposedly the age for early retirement--a vice president and the president of a company that Henkel had taken over. Thomas suggests that Henkel's well-known reason for this practice is to save on retirement benefits. If it is Henkel's position that it fires older employees "merely" to save on pension benefits, then the jury should be given the opportunity to consider such a policy as evidence of age discrimination. See White v. Westinghouse Elec. Co., 862 F.2d 56, 62 (3d Cir. 1988) (discharge of employee to avoid payment of pension benefits relevant to demonstrate pretext in ADEA case because these benefits are inextricably linked to years of

service and hence age; thus summary judgment inappropriate); Metz v. Transit Mix, Inc., 828 F.2d 1202, 1208 (7th Cir. 1987) (firing older employee assertedly because his pay is too high may be taken as evidence of age discrimination on case-by-case basis if facts support conclusion that pay is a proxy for age).[4]

Finally, Tuck presents some probative evidence that Heer, Tuck's former supervisor, was biased against older workers and that Heer influenced the decision to fire Tuck. According to Tuck, Heer repeatedly stated that he wanted to get rid of the older people and replace them with "young blood." J.A. 101. Thomas wrote that Heer pointedly told several older employees, including Tuck, that what Henkel

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[4]In EEOC v. Clay Printing Co., 955 F.2d 936, 942 (4th Cir. 1992), this court determined that an employer's general statement relating years of service, salary, and age did not provide evidence of age discrimination in firing because it was "not related to a person, employment decision, or hiring or firing practice." The statement discussed in *Clay* is unlike the evidence that Tuck presents here, which, if true, suggests that Henkel's desire to save on pension benefits is directly related to their practice of firing older employees.

needed was *"younger people."* J.A. 323. Because these comments suggest a desire to fire older employees and replace them with younger ones, they demonstrate, for summary judgment purposes, Heer's age-bias.[5] The question then arises whether Heer influenced Tuck's dismissal. Tuck alleges that Kahn was the real decision-maker based on the "confidential" note, Sears' previously expressed admiration for Tuck's work, and Sears' and McDonald's arguably incredible story surrounding their decision to fire Tuck. Kahn admitted

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[5]In *Clay Printing*, 955 F.2d at 942, this court held that employer statements that it needed to "attract newer, younger people" and "young blood," were not probative of age discrimination or discriminatory purpose. In *Clay Printing*, the evidence did not show that the employer's positive references to younger potential employees suggested that the older existing employees should be fired. We do not read *Clay Printing's* holding to prevent statements that a company wants to replace its older employees with younger ones from being considered evidence of age discrimination, for it was to keep older workers from suffering adverse employment actions based on the assumption that younger workers are more desirable by virtue of their age that Congress enacted the ADEA. See 29 U.S.C. § 621(b) ("It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age").

that Heer had frequently told him that Heer was displeased with Tuck. Even if Sears and McDonald did alone decide to fire Tuck, Sears similarly admitted that he had read Heer's poor evaluations of Tuck and that Heer had spoken with Sears negatively about Tuck. Whether Heer influenced Kahn or Sears is thus an open question.[6] Also, the fact that Heer is head of the R&D Group that would be the largest beneficiary of Tuck's discharge, according to Henkel's account, suggests a continuing role for Heer in making that decision.

In open court the district court below expressed concern over the issue of Heer's age bias and whether he

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[6]Henkel relies on Gunter v. Coca-Cola Co., 843 F.2d 482, 484 (11th Cir. 1988), for the proposition that a fired employee cannot rely on demonstrating the prejudice of a supervisor who is not the ultimate decision-maker to prove that discrimination motivated the employer's termination decision. However, *Gunter* was decided under Fed. R. Civ. Proc. 52(a)'s "clearly erroneous" standard of review, not Rule 56(c)'s summary judgment standard, because the trial judge had decided as a factual matter after trial that the decision-maker did not rely on the manager's negative comments in deciding to fire the employee. In this case, no factfinder has determined to what extent Heer influenced Tuck's discharge.

influenced Tuck's dismissal, but the court was ultimately persuaded that if Heer did influence Tuck's discharge, such influence was age-neutral. *See* J.A. 26-32, 52. By making this determination, the court denied Tuck the benefit of all permissible inferences; it is the jury's job at trial to weigh the evidence, not the court's business to do so at summary judgment.

III.

For the aforementioned reasons, we reverse the district court's grant of summary judgment in favor of Henkel and remand the case for trial on the merits.

REVERSED AND REMANDED

Filed: September 3, 1992

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 91-2591
(CA-90-79-C-C-MU)

Robert E. Tuck,

Plaintiff - Appellant,

versus

Henkel Corporation,

Defendant - Appellee.

ORDER

The Court amends its opinion filed August 25, 1992, as follows:

On Page 7, first paragraph, lines 2-3 -- the parenthetical phrase "(between 40 and 70, 29 U.S.C. § 631(a))" is corrected to read "(over 40, 29 U.S.C. § 631(a))."

For the Court - By Direction

/s/ Bert M. Montague
Clerk

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
September 24, 1992

No. 91-2591

ROBERT E. TUCK

Plaintiff - Appellant

v.

HENKEL CORPORATION

Defendant - Appellee

On Petition for Rehearing with Suggestion
for Rehearing In Banc

Appellee filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Ervin, with the concurrence of Judge Phillips and Judge Murray.

For the Court,

/s/ Bert M. Montague

CLERK

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED

October 1, 1992

No. 91-2591
CA-90-79-C-C-MU

Tuck v. Henkel Corporation

M A N D A T E

The judgment of this Court dated 8/25/92 takes effect today.

BERT M. MONTAGUE
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL ACTION NO. C-C-90-0079-M

ROBERT E. TUCK,

Plaintiff,

v.

HENKEL CORPORATION

Defendant.

AFFIDAVIT IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

COUNTY OF MECKLENBURG)
)
STATE OF NORTH CAROLINA)

Personally appeared before me Mr. Brent Sears, who, upon oath duly sworn deposes and states as follows:

1. My name is Brent Walker Sears and I am the Plant Manager of Henkel Corporation's manufacturing

operations in Charlotte, North Carolina. My responsibilities include the management of all Company manufacturing operations in Charlotte, North Carolina. I am 50 years old.

2. The Company's Charlotte plant operations included two manufacturing facilities, one on Westinghouse Boulevard and the second on Sugar Creek Road. Prior to his layoff from the Company, Robert Tuck was plant manager at the Sugar Creek Road manufacturing facility. Mr. Tuck was laid off on March 15, 1989 as part of an overall work force reduction in the Charlotte manufacturing facilities. During the first quarter of 1989, Neville McDonald and I decided that certain cost reducing measures were necessary in both Charlotte manufacturing facilities (Westinghouse Boulevard and Sugar Creek Road). Mr. McDonald was Vice President of Manufacturing Engineering, Organic Products Group and is 50 years old. Among a number of cost reducing measures, we decided to combine and/or eliminate certain job functions and responsibilities at both facilities.

3. While Mr. Tuck was Plant Manager at Sugar Creek, technical expertise in chemistry for assisting in resolving day-to-day manufacturing problems were provided by employees in the Textile Chemical Research and Development ("R&D") Group. These R&D employees had chemistry degrees from at least the college level or higher. This technical expertise was necessary because there was limited chemistry or engineering expertise among the existing Sugar Creek plant staff which included Mr. Tuck who had no technical degree. For several years prior to the work force reduction, we relied on the Company's Textile Chemical R&D Group to assist in providing the day-to-day technical support for Sugar Creek plant operations. However, because of the changing business conditions which motivated our work force reduction in 1989, it became necessary to reduce this reliance on these R&D employees. The Company needed an increased R&D effort for new product development. Thus, Mr. McDonald and I decided to combine technical support

responsibilities with manufacturing responsibilities at the Sugar Creek facility in a reconstituted Plant Manager position thus eliminating a management level position as part of the overall work force reduction.

4. After deciding to combine a technical position and a manufacturing position, Mr. McDonald and I evaluated who would be best qualified to fill the combined position. At the time of the decision, there were four (4) area managers which we reviewed for possible changes. They were:

1) Mark Smith, (age 37) Westinghouse Technical Manager
2) David Horton, (Age 48) Westinghouse Manufacturing Representative Manager
3) Michael Pawlyk, (age 48) Westinghouse Production Manager
4) Robert Tuck, (age 59) Sugar Creek Plant Manager.

We considered the following factors in deciding which managers to retain: (1) technical ability as represented by education and technical experience; and (2) past performance. Applying these criteria, it was determined that Plaintiff was the least technically proficient, which made his management

position more reliant on the R&D personnel at the Sugar Creek facility.

5. Mr. McDonald and I decided that Mr. Smith's qualifications best fit the reconstituted plant manager position at the Sugar Creek facility. In 1974, Mr. Smith received a B.S. degree in chemical engineering from Purdue University. Two years later he received his Masters degree in chemical engineering also from Purdue University. Mr. Smith's employment with Henkel also included a number of technical positions which required extensive technical background. They included: research engineer (February 1, 1977-December 1, 1980), pilot plant process engineer (December 1, 1980-December 1, 1984), process engineer (December 1, 1984-January 1, 1985), senior process engineer (January 1, 1985-October 1, 1987) and technical manager (October 1, 1987-March 6, 1989). His B.S. and Masters degrees in chemistry and his extensive past experience in various technical positions enabled him to assume the management

responsibilities as well as provide the technical assistance previously provided from the Textile Chemical R&D staff. With this change, Textile Chemical R&D employees were needed less for addressing day-to-day manufacturing matters. Therefore, they were able to provide greater concentration on new product development. Mr. Tuck had no technical degree comparable to Mr. Smith. Additionally, because Mr. Smith also had past managerial experience, he was considered the best qualified as a plant manager capable of dealing with both the technical side and managerial responsibilities of the reconstituted plant manager's position at Sugar Creek.

6. Based on the above analysis, we made the following decisions for the four management positions we evaluated. Mr. Pawlyk retained his responsibilities at Westinghouse. Mr. Horton retained his responsibilities at Westinghouse and he was assigned additional technical responsibilities which had been done by Mr. Smith at that location. Mr. Smith was assigned the newly combined

technical and manufacturing representative position as Plant Manager at the Sugar Creek facility. Finally, Mr. Tuck was included in the work force reduction in March 1989.

7. Only Mr. McDonald and I were involved in making the decisions I have described in this affidavit. Our decisions regarding the work force reduction which included the layoff of Mr. Tuck was in no way motivated by Mr. Tuck's age. The decision to reduce the work force and take other steps to reduce costs was strictly an economic one, and the decision to layoff Mr. Tuck was motivated only by our decision as to who would best meet the Company's needs in the reconstituted plant manager position at the Sugar Creek facility.

8. I have given this affidavit freely and voluntarily. The statements contained in this affidavit are my own and are true to the best of my knowledge. I have based this affidavit on my personal knowledge.

/s/_____
Brent Sears

Sworn to and subscribed before
me this 30th day of April, 1991.

_____

Notary Public

My commission expires:_____.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL ACTION NO. C-C-90-0079-M

ROBERT E. TUCK,

Plaintiff,

v.

HENKEL CORPORATION

Defendant.

COUNTY OF MECKLENBURG

STATE OF NORTH CAROLINA

AFFIDAVIT IN SUPPORT OF
SUMMARY JUDGMENT MOTION

Personally appeared before me Mr. Leo Hageman, Jr., who, upon oath duly sworn deposes and states as follows:

1. My name is Leo Hageman, Jr. and I am the Human Resources Manager for Henkel Corporation's Charlotte facilities.

2. In 1989 Brent Sears and Neville McDonald decided that certain cost-reducing measures were necessary in Henkel's Charlotte manufacturing facilities (Westinghouse Boulevard and Sugar Creek Road). Among other cost reduction measures, a workforce reduction and reorganization was implemented. As a result, an open supervisory position within manufacturing was canceled and additional employees were laid off. The laid off positions included: one (1) plant security guard, six (6) production operator positions, and one (1) manufacturing manager.

3. Those employees laid off in March 1989 were not offered the opportunity to transfer to other positions within Henkel's Charlotte operations or other Henkel facilities outside of Charlotte.

4. I have given this affidavit freely and voluntarily. The statements contained in this affidavit are my own and are true to the best of my knowledge. I have based this affidavit on my personal knowledge.

/s/_____
Leo Hageman, Jr.

Sworn to and subscribed before
me this 10th day of June, 1991.

_____
Notary Public

My commission expires:_____

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT

OF NORTH CAROLINA

CHARLOTTE DIVISION

CIVIL ACTION NO. C-C-90-0079-MU

ROBERT E. TUCK,)
)
Plaintiff,)
)
vs.)
)
HENKEL CORPORATION,)
)
Defendant.)
)
)

DEPOSITION
OF
BRENT W. SEARS

At Charlotte, North Carolina

May 8, 1991

REPORTER: COLLEEN MOORE PIERPONT, CVR
Notary Public

* * *

A. I was the manager of the Charlotte-Westinghouse facility on Westinghouse Boulevard. I also had management responsibility for the manufacturing portion of the Sugar Creek Henkel facility.

* * *

* * *

Q. To whom did Mr. Bob Tuck report just prior to March 1, 12 1989?

A. He reported to myself.

Q. Now, he reported to you them, but how long had he been reporting to you, roughly?

A. I'm not sure of the exact timing, but I would approximate it at a year.

* * *

* * *

Q. I'm sorry, go ahead. You did what? You explained the need for a change?

A. Explained the need for the change at Sugar Creek, which resulted in the fact that he would not any longer have a position there.

Q. Is that all? I mean, are you finished?

A. That's the gist of the conversation. Now, there were details that were a part of that -- in that explanation.

Q. Now, will you tell us the details, first as to what

you told him the need for the change was?

A. I explained to Bob that there were two needs that existed. One was that there needed to be an increased technical component of the plant manager's position at Sugar Creek; that the business need was now such that new technical support that had been provided by the R&D function at Sugar Creek to the plant was no longer available, and that there needed to be an increased technical competence within the manufacturing location

at Sugar Creek. The second reason was that there was a need to reduce costs at all the Charlotte locations within the city. That was the crux of the discussion.

* * *

* * *

Q. Now, did you do anything to determine Mr. Tuck's technical competence?

A. The experience that Bob and I had at the plant for roughly a year, the need for the R&D support for any technical problem at the plant, I think was evidence of that.

* * *

* * *

Q. Whose decision was it to terminate Mr. Tuck as plant manager on or about March 1, 1989

A. That decision was made by myself and Mr. McDonald.

Q. That's Mr. Nevil McDonald in Ambler, Pennsylvania?

A. That's right.

Q. And his title then was what?

A. Then? I believe it was vice president of manufacturing and technology.

When was that -- well, I was going to say when was that decision made, but first, when was it first discussed?

MR. SPEARS: When was what first discussed?

Q. The need to terminate Mr. Tuck. When was the need to terminate Mr. Tuck first discussed between you and Mr. McDonald?

A. I really don't recall the exact timing of that; shortly before the termination.

Q. And the termination was told to him on March 1, 1989, effective March 15, 1989, I believe?

A. That's correct.

* * *

Q. Did you and Mr. McDonald base Mr. Tuck's termination on any of the performance reviews given by Dr. Heer?

A. No, sir.

* * *

Q. Was your decision based on those reviews?

A. No, sir.

* * *

* * *

Q. Where was Mr. Mark Smith transferred to?

A. At what point?

Q. When he left Sugar Creek. Has he been transferred again?

A. Yes, he has.

Q. Where was he transferred to when he left Sugar Creek?

A. To the Mauldin, South Carolina, facility.

* * *

* * *

Q. I just have a few more questions. Now, it's your sworn testimony that you and Mr. Nevil McDonald were the only two that decided on terminating Mr. Tuck March 1, 1989, is that correct?

A. We were the only two involved in that decision, yes.

* * *

* * *

Q. You were asked some questions about when Mr. Smith was transferred to Mauldin. I believe your testimony was that at that point, a decision was made to close Sugar Creek, and as I recall, you testified that the needs were different in relation to Mr. McKillop becoming -- or having some responsibility at Sugar Creek. Do you recall that testimony?

A. Yes.

Q. What do you mean by the needs were different at the point that the decision was made to close down Sugar Creek?

A. Well, at that time, the announcement was public that we were going to close the Sugar Creek facility. The focus for the remainder of that time that the plant was in operation was different in that it was maintain the status through the closure of the plant, rather than a focus on introducing new products or continue

improving products that would require the technical ability that we had talked about previously.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL ACTION NO. C-C-90-0079-MU

ROBERT E. TUCK,	)
	)
Plaintiff,	)
	)
vs.	)
	)
HENKEL CORPORATION,	)
	)
Defendant.	)
	)

DEPOSITION
OF
NEVILLE MCDONALD

CONFIDENTIAL

This envelope or container contains documents, materials, or tangible things filed in this case by Henkel Corporation and is not to be opened nor the contents thereof

displayed or revealed except by the Court or upon Order of the Court.

At Charlotte, North Carolina

May 16, 1991

REPORTER: ANN H. TRAMMELL
Notary Public

* * *

Q. Can you recall any conversations from the time Mr. Brent Sears started reporting to you in mid-'88 on through the rest of 1988, specifically directed to lowering the cost of production of chemicals at the Westinghouse plant in Charlotte, North Carolina?

A. Yes. In October and November, during what we call the planning process, which is when we establish our plan and budget for the upcoming year, we discussed the

fact that the projected volume of products out of the Westinghouse plant was going to be significantly less than the year before, and that was a problem. Did you issue any sort of instructions to Mr. Sears to alleviate that problem?

A. In the end of the year -- the period November, December -- he and I had a number of conversations as to what we might do to improve the situation; specifically, could we go to a five-day schedule instead of a seven-day schedule.

* * *

A. Yes. To reduce from a seven-day-a-week operation to a five-day-a-week operation.

Q. Any other methods of reducing the cost that you recall?

A. That was the principal thrust.

* * *

* * *

Q. Well, let me rephrase it then, and say in the year 1989 were there any discussions in which you were involved with respect to terminating Bob Tuck as plant manager of the Sugar Creek plant in Charlotte?

A. There were discussions in, I think, late February regarding four possible individuals who were considered for termination.

Q. Were you a party to these discussions in about late February of 1989?

A. I was part of the process, yes.

* * *

* * *

Q. Why was Mr. Bob Tuck terminated on our about March 1, 1989, as you understand it?

A. There were two reasons. One was the nature of the job in Sugar Creek had changed, and the requirements of the plant manager were quite different to those that had existed previously. And second was that we were attempting to reduce our cost overall in the face of a difficult year in 1989.

* * *

* * *

Q. Whose decision was it to close the Sugar Creek, Charlotte, plant?

A. It was really my decision.

Q. When did you decide?

A. Pretty much immediately following the Emory acquisition.

Q. And when was that?

A. That was, I guess, June of 89. Yes, that time period, the summertime of '89.

Q. Why was the decision made to close the Sugar Creek plant?

A. Because in acquiring Emory we've now got another plant

in Mauldin, South Carolina, that was making textile chemicals, and it was very clear that we had too many facilities and too much capacity. We had to take something out of the chain, and Sugar Creek was the one that we decided to take down.

* * *

* * *

EXAMINATION BY MR. SPEARS

Q. You testified, I think, that you and Mr. Sears made the decision with regard to the reductions in March of '89.

A. That's correct.

Q. Was anyone else involved in that decision making besides you and Mr. Sears?

A. No. We made the decision.

Q. Was Dr. Heer involved in any way in making the decision?

A. No.

25 Q. Was Mr. Kahn involved in any way in making the

decision?

A. Not in making the decision, no.

Q. You testified about his role and your discussions with him?

A. Correct.

Q. But that was not decision making by him?

A. No. He was used as a sounding board or a consultant.

Q. After Mr. Smith left Sugar Creek, Mr. McKillop was in charge?

A. That's correct, yes.

Q. What was his assignment at Sugar Creek?

A. He was to basically make those products that we wanted

to continue to make there and to shut the plant down.

Q. You testified earlier that there was a change when Mark Smith left?

A. Yes.

Q. The change from not introducing new products there?

A. Yes. The objective was to gradually run down the operations at Sugar Creek.

Q. Did Mr. McKillop have any responsibility with regard to the technical aspects of the chemicals being produced at Sugar Creek?

A. What do you mean by the technical aspects?

Q. Well, like Mr. Smith would have in his role as the

manufacturing chemist while he was there.

A. No, no.

* * *

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL ACTION
NO. C-C-90-0079-MU

- - -

ROBERT E. TUCK, :
Plaintiff :
:
-vs- :
:
HENKEL CORPORATION, :
Defendant :

- - -

Oral examination of ROBERT S. KAHN,

taken in the offices of HENKEL CORPORATION, 300 Brookside Avenue, Ambler, Pennsylvania on Friday, May 17, 1991 beginning at 1:25 p.m., before Joyce Brill, Court Reporter and Notary Public in and for the Commonwealth of Pennsylvania.

Q. You know, of course, that Mr. Tuck was terminated March 1, 1989; is that correct?

A. On or about.

Q. Can you tell us who, if you know, made the

decision to terminate Mr. Tuck

A. Brent Sears.

Q. Did you play any part in that decision?

A. I did not make the decision. Human resource people do not make decisions regarding terminations.

* * *

Q. According to your handwritten note as I read it, it says "Based on our plans I would ask you and Brent to reconsider the appropriateness of a salary increase." This is from you to Mr. Mark Schubert; is that right?

A. yes.

Q. What did you mean by "Based on our plans?" What are "our plans?" What does that mean?

A. By "our" I guess I meant Henkel's plans. By the time I wrote this note we knew that we had to reduce expenses in the Charlotte area and that we would have to have a reduction in force.

And we also knew that there was a possibility that this could affect Mr. Tuck somewhat. It could result in his position being changed. It could result in his termination. That decision had not been made. In light of the fact that his position might go to a different position, I was asking to reconsidering the appropriateness of a salary increase. To me, at this time, was the question. And the "plans" related to plans of reduction in force that could affect many, many people in the organization.

Q. Was there any particular plan for Mr. Tuck compared to any other employees?

A. No, sir.

* * *

* * *

Q. Isn't it true, Mr. Kahn, that at the time you wrote that note you were reasonably sure that Mr. Tuck would be terminated as plant manager of the Sugar Creek plant; isn't that true?

A. At the time I wrote this note I knew that it was a possibility, but I did not know if he would be terminated. I did not know it.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
CHARLOTTE DIVISION

File No. C-C-90-0079-MU

ROBERT E. TUCK,	)
	)
Plaintiff,	)
	)
vs.	)
	)
HENKEL CORPORATION,	)
	)
Defendant.	)
	)
	)

AFFIDAVIT OF MARTIN E. THOMAS
IN SUPPORT OF PLAINTIFF'S
RESPONSE TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

Personally appeared before me, MARVIN E. THOMAS, who, being first duly sworn, on his oath deposes and says that:

1. My name is Marvin E. Thomas, and I reside at 706 Willow Lane, Harrisburg, North Carolina 28075. I am 53 years old, having been born on May 23, 1938.

2. I have been employed by Henkel Corporation since about June 26, 1961, came up through the ranks, and was promoted to Superintendent of Production and Warehouse at the Henkel Sugar Creek Road facility, Charlotte, N.C. in 1972. I held that position until I was terminated on April 14, 1991.

3. The Henkel Corporation is a German owned company with its home office in Germany, but with a number of facilities in the United States.

4. I have known the plaintiff in this case, Mr. Robert E. (Bob) Tuck, who was Plant Manager at Sugar Creek for many years until he was terminated on March 1, 1989 just after he suffered a slight hear attack, for about fifteen (15) years.

5. I was concerned to see Henkel Corporation terminate Mr. Tuck, and I also am extremely upset concerning my own termination on April 14, 1991, as I would have had 30 years employment for retirement purposes with Henkel Corporation if I had been allowed to work at Sugar Creek or elsewhere for Henkel Corporation two more months until June 26, 1991, which I understand would have increased by retirement pay considerably.

6. After it was announced by Henkel Corporation in January of 1990 that their Sugar Creek Road, Charlotte, N.C. facility would be closing, I am informed and believe that the only management employee in manufacturing at Sugar Creek who was transferred to another Henkel Corporation job was Mark Smith, whom Henkel Corporation had made Plant

Manager in place of Mr. Tuck on March 1, 1989, and who I am advised was then 37 years old. Mr. Smith was transferred to Mauldin, S.C. about April 1, 1990, after which all of the other management personnel in manufacturing at Sugar Creek, all of whom were over 40 years of age, were told they were terminated and that no other job could be found for them.

7. Mr. Brent Sears, Plant Manager at Henkel's Westinghouse Road, Charlotte, N.C. facility, had twice told me that if the Sugar Creek Plant facility closed, if I was not placed in a job at another Henkel facility, he would see that I was given a job at Westinghouse, at least until I reached age 55.

8. Mr. Michael D. Schubert had been Manager of Human Resources in Charlotte prior to a few months before Henkel Corporation officially announced in January 1990 that it was closing the Sugar Creek facility, but a Mr. Leo Hageman was sent to take Mr. Schubert's place sometime prior to the announcement of the Sugar Creek plant closing, and he has handled personnel matters having to do with transfer or termination of employees in connection with the Sugar Creek facility closing.

9. A new job was created for Mark Smith and he was transferred out very quickly after the closing was announced, and Mr. Tom McKillop took his place.

10. The Sugar Creek plant continued in full operation until the end of 1990 when certain of its machinery was removed from the plant and located elsewhere. Mr. McKillop is now the only employee remaining in the manufacturing department at Sugar Creek, along with some temporary employees.

11. In my case, Henkel Corporation led me to believe I had a chance to transfer to another position in its plants in Mauldin, South Carolina or in Cedartown, Georgia, and I was sent to interview for positions at each of these facilities. Mr. Hagement met me in Mauldin, S.C. and the interviews at both plants were conducted as if I were a "new hire" for Henkel Corporation. I am informed and believe that even the non-management operators, some of whom were given jobs at the Westinghouse facility, were stripped of all their seniority, except years of service for retirement purposes, and considered as "new hires" for all other purposes, such as transfer rights, promotion rights, priority of lay-off, etc.

12. I was not "selected" by Henkel Corporation to fill the open positions at Mauldin, S.C. or at Cedartown, Georgia, and was told that Henkel had no openings, yet at about the same time that I and the other Sugar Creek management personnel from the manufacturing department with long experience, but over 40 years old, were being terminated and refused other jobs with Henkel, Henkel Corporation was at the same time advertising for <u>new</u> employees. As evidence of this statement, I attach as Exhibit "A" an advertisement from page 13G of The Charlotte Observer's classified ad section of Sunday, April 21, 1991 including "Henkel Corporation" in the Charlotte Regional Career Advantage Job Fair, and as Exhibit "B" a hand-out given at said Job Fair on Monday, April 22, 1991 whereon Henkel Corporation advertised that it had positions available for "chemist, textiles, lab technicians, product development manager, truck driver (LD)." Surely I could have been given one of these jobs, other than a Chemist or Lab Technician job. Further, Henkel had subsequently also hired persons for customer service jobs, but no one has ever attempted to offer any of these jobs to me.

13. It has been apparent for many years to anyone employed by Henkel for a considerable length of time that the corporation has a policy of terminating its employees as they become older, generally before reaching age 55 and certainly before age 60, and thus before higher monthly payments have become payable under Henkel's retirement plans, an example being the termination of Larry Bingaman shortly after he had a heart attack.

14. As for Bob Tuck, his superior in about 1987 was Dr. Rudy Heer. In about May or June of 1987, Dr. Heer, Bob Tuck, Joe Miller and I were discussing the health of two employees, Curtis Ivey and William Stowe, at the Sugar Creek plant. Dr. Heer very pointedly, although not directed at any one of us specifically, made the statement that what Henkel Corporation needed was younger people. From his manner of speaking, there was no question but that Dr. Heer meant what he said and that he was referring not only to Mr. Ivey and Mr. Stowe, but to Mr. Tuck, Mr. Miller, and to me. I was so struck by the definiteness of Dr. Heer's statement that I told Joe Miller I thought I had better write down and document what Dr. Heer had just said and the date, which I then proceeded to do. I then gave a copy of my written note to Joe Miller, and I kept a copy. I placed my copy in my desk, but when I looked for it after Bob Tuck had his heart attack, it had been removed from my desk. I later wrote out a resume of my recollection for Bob Tuck, and both Joe Miller and I signed same.

15. After Bob Tuck was terminated, he was replaced by Mark Smith, who was not a chemist, but who I understand had a college degree, I believe in chemical engineering. It was obvious from the outset that he had no experience whatever in running a chemical plant, and little interest in learning about same. Mr. Smith generally stayed in his office with the door closed, working with his computer.

I was Superintendent of Production and Warehouse and had been used to discussing any problems in producing batches of chemicals with Mr. Tuck as my Plant Manager. Mr. Smith advised that I was qualified to do my job, and that I was not to interrupt him when his office door was closed, even for an emergency. I never knew him to make any decisions regarding altering any chemicals without calling on his wife, who was a chemist at the Westinghouse facility. Mr. Smith did not know, and never tried to learn, much about our products at Sugar Creek.

16. I know of no change whatever that took place with respect to the Research and Development staff or chemists spending more or less time in assisting with our production of chemicals at Sugar Creek under Bob Tuck as Plant Manager, under Mark Smith as Plant Manager, or under Tom McKillop as Plant Manager. It had always been rare that anyone from R & D ever had anything to do with production after R & D developed and released a new product for production. R & D was called to the same extent if a problem developed under Mr. Tuck, Mr. Smith, and Mr. McKillop, up until production was decreased on closing the plant. I also am aware of no increase in the development of new products by R & D during the time Mark Smith was Plant Manager. As I was Superintendent of Production, I was in a position to know the foregoing things.

17. Mr. Tuck was always an excellent Plant Manager. Henkel Corporation's Attorney, together with Mr. Leo Hageman, came to the Sugar Creek plant about late September of 1990 trying to obtain a statement from me that Mr. Smith was more technically qualified and capable than Mr. Tuck as a Plant Manager, but I would make no such statement to them.

18. I have given this Affidavit based on my personal knowledge freely and voluntarily and the statements contained herein are true to the best of my knowledge.

/s/_____
Marvin E. Thomas

Sworn to and subscribed before me
this the 7th day of June, 1990.

_____
Notary Public

My Commission Expires: _____
(Affix Notarial Seal)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL ACTION NO. C-C-90-0079-M

ROBERT E. TUCK,)
)
Plaintiff,)
)
vs.)
)
HENKEL CORPORATION,)
)
Defendant.)
)
)

DEPOSITION
OF
ROBERT E. TUCK

At Charlotte, North Carolina

October 16, 1990

REPORTER: Colleen Moore Pierpont, CVR
Notary Public

* * *

A. I believe that because of my age that Dr. Heer wanted me to fall flat on my face, is what I believe, and strictly because of my age. Because it couldn't have been because of my ability to operate a plant.

Q. Did Dr. Heer ever say anything to you about your age?

A. Not directly, other than he wants to get rid of the older people or he needed young blood around him, or things of this nature.

Q. Did he ever say anything directly about your age?

A. He didn't come in and say, "Hey, you're 60 years old, I'm going to get rid of you." No, he did not say that.

A. Well, did he ever say anything about your age?

A. About my age?

Q. Right.

A. No. The way that he said things, it was so obvious that he was meaning me, because if you look at all the other guys that they let go, they were all in their 50's, late 50's or 60's. And here I am hitting 60, I know he's talking about me.

Q. What was it he said that you think referred to you?

A. Well, I'll repeat it again, He said that he wanted to

get rid of all of the older people.

Q. Who said that?

A. Dr. Heer.

Q. To who?

A. He said it to me, and he's even -- he said things of this nature to other people. Marvin Thomas, as an example, or Joe Miller. Talk to them if you'd like,

because he's made that statement in front of them as well. But he was always making these catty remarks, and it made me feel as though he was talking directly to me. . . .

* * *

29 U.S.C. §621 et seq.

Sec. 623. Prohibition of Age Discrimination

(a) Employer practices

It shall be unlawful for an employer--(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;...

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse

party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

No. 92-1103

Supreme Court, U.S.
FILED
JAN 21 1993
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

HENKEL CORPORATION,

Petitioner,

versus

ROBERT E. TUCK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Eugene C. Hicks, III
807 Law Building
730 East Trade Street
Charlotte, NC 28207
(704) 334-5375
(Counsel of Record
for Respondent)

October 1992

QUESTION PRESENTED

In resolving employment age discrimination cases at the pretext stage, are the Court and the employee bound to accept as true the names of the "decision-makers" as designated by the employer, and therefore is Respondent required to rebut the employer's alleged "specific reasons" for a challenged employment decision, or can Respondent show "pretext" by evidence that the employer's designated "decision-makers" in fact were not the actual "decision-makers," and that the decision of the actual "decision-makers" more likely than not was based on age bias?

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ADDITIONAL STATEMENT OF THE CASE

The Petitioner's "Statement of the Case," (and indeed Petitioner's entire Petition and Argument) is based solely on Petitioner's contention that "McDonald and Sears were the only decisionmakers in selecting Smith for the reconstituted plant manager position and Tuck's layoff."

Petitioner's Statement of the Case fails to point out clearly to the Court the contentions of both the Petitioner and the Respondent.

After plaintiff made out his prima facie case, creating a rebuttable presumption of age discrimination, the employer articulated as its "legitimate, nondiscriminatory reason" for terminating plaintiff (age 59) on March 1, 1989 and replacing him as Plant Manager of its Sugar Creek Road Plant in Charlotte, N.C.

with Mark Smith (age 37) (Pet. App. A-55), that only Neville McDonald and Brent Sears made the employer's management decision to discharge Tuck for reasons satisfactory to the employer (Pet. App. A-86, & A-98).

The Statement of the Case should have stated that Respondent then presented evidence that Petitioner's articulated reason was "pretext," and should have stated that Henkel Corporation contended that "a workforce reduction occurred in March 1989," but that Robert Tuck's evidence was to the effect that there was no workforce reduction applicable to his termination, as the workforce reduction was only at Petitioner's recently acquired Westinghouse Boulevard Plant (Pet. App. A-56) and that he (Tuck) was the only person affected at its Sugar Creek Road

Plant, where he had been Plant Manager for 12 years; that Henkel Corporation contended that the termination of Tuck was one of its "cost reduction measures" (Pet. App. A-9), but that Tuck's evidence was to the effect that no cost reduction was needed or discussed for the Sugar Creek Road Plant (Pet. App. A-7), as opposed to the Westinghouse Boulevard Plant; that Henkel contended that McDonald and Sears decided that Mark Smith's greater education and technical knowledge best fit their alleged goal for a reconstituted plant manager position (Pet. App. A-2), but that Tuck's evidence was to the effect that no actual change was made in said position at the Sugar Creek Road Plant after his termination (Pet. App. A-130), and further that within a year Henkel Corporation replaced Mark Smith with Tom McKillop as Plant

Manager (Pet. App. A-101 & 127) and that McKillop had no more education or technical knowledge than Tuck (Pet. App. A-63).

The Statement of the Case further should have pointed out particularly that Henkel contended that McDonald and Sears were "the only decisionmakers," whereas Tuck's evidence tended to show that it was not McDonald and Sears who decided on his (Tuck's) termination, but rather that it was Robert Kahn, head of Henkel's Human Resources department in Ambler, Pennsylvania (Pet. App. A-27) (through Mr. Michael Shubert, Human Resources Manager and head of personnel in Charlotte, N.C.) (Pet. App. A-127), in concert with admittedly age biased Dr. Rudy Heer (Pet. App. A-11, 12, 16 & 135), who Mr. Kahn stated had told him (Mr. Kahn) that he no longer wanted Tuck as

Plant Manager at the Sugar Creek facility in Charlotte, Dr. Heer having been Tuck's former direct superior for some time (Pet. App. A-129), and then having been head of the Research and Development Group at the Sugar Creek Road Plant when Tuck was in fact terminated.

Additionally, the Statement of the Case should have made it clear that the employer's evidence is that McDonald and Sears made Henkel Corporation's decision to terminate Tuck, and so advised Mr. Schubert in the Charlotte Human Resources or personnel department just prior to terminating Tuck on March 1, 1989 (Pet. App. A-99), but that Tuck's evidence showed that during consideration of a wage increase for Tuck, which increase had already been approved by Sears (who according to Henkel was one of the decision-makers), signed by Schubert on

December 22, 1988, and forwarded for implementation to Kahn as head of Human Resources in Ambler, Pennsylvania, that shortly thereafter (and nearly three months before Henkel's alleged decision-makers testified that they made their decision to terminate Tuck), Mr. Kahn did not approve Tuck's wage increase, but rather wrote a "Confidential" note on the back of same and returned it to Schubert to handle with Mr. Brent Sears (Pet. App. A-25 through 27), said note reading:

> "CONFIDENTIAL -
> RSK ⟶ M Schubert
> Based on our plans I would ask you and Brent to reconsider the appropriateness of a salary increase."
> (Pet. App. A-122)

The Statement of the Case should have included that Tuck's evidence as to the real decision-makers, and the age

biased nature of that decision, coupled with evidence that no force reduction took place at the Sugar Creek Road Plant, that no monetary reason existed to alter the Sugar Creek Road Plant personnel, that Mark Smith actually made no changes in the Sugar Creek Road Plant, and in fact shortly thereafter was himself transferred and replaced with another Plant Manager with no more education or technical knowledge than Tuck, and that the Research and Development Group, headed by Dr. Rudy Heer when Tuck was terminated, functioned as usual, were all produced by Tuck to show the pretextual nature of Henkel's articulated "legitimate, nondiscriminatory reason" for terminating Tuck, and that same was not worthy of belief.

SUMMARY OF ARGUMENT

Briefly stated, all six of the "Questions Presented" by employer are meaningful only if the employee in an ADEA case is required to accept without question the truth of the employer's articulated "legitimate, non-discriminatory reason" for termination of an employee, which is not the case.

In this instance, Tuck's "pretext" evidence is that the entire story advanced by Henkel Corporation was fabricated, in that McDonald and Sears were not the decision-makers, as Henkel contends, but rather that Robert Kahn, Director of Human Resources in Ambler, Pennsylvania, influenced by age-biased Dr. Rudy Heer, made the decision to terminate Tuck nearly three months before McDonald and Sears allegedly decided on his termination, as particularly

evidenced by a "Confidential" note from Kahn to his subordinate in the personnel department in Charlotte cancelling an approved wage increase for Tuck due to their "plans" -- just prior to Tuck's termination.

Petitioner erroneously argues that the law is that plaintiff's "pretext" inquiry must focus on those specific reasons advanced by the employer for a challenged employment decision.

Based mainly on this erroneous perception of the law, Petitioner has brought this Petition for Writ of Certiorari and argues that the Fourth Circuit's opinion conflicts with that of other circuits, which it clearly does not.

The Fourth Circuit in this case very simply held that the factual evidence presented by Tuck carried his burden of

showing that Henkel's articulated legitimate, nondiscriminatory reason for Tuck's termination was unworthy of credence, such that Tuck should be granted a trial by jury. The case is about the quantum of Tuck's proffered evidence, and not about a departure by the Fourth Circuit from the established law of this Court or of other circuits.

ARGUMENT

I. GENERAL DISCUSSION OF PETITIONER'S SIX "QUESTIONS PRESENTED".

Petitioner has set out six "Questions Presented." All are "evidentiary" questions and none are questions for review by this Court under Rule 10 of the Rules of the Supreme Court of the United States.

All of Petitioner's questions are meaningful only if the trial court and

the employee are required to accept without question the truth of the employer's articulated "legitimate, non-discriminatory reason" for its business decision resulting in termination of the employee in an ADEA case.

In this case, contrary to the situation in most ADEA cases, Tuck's evidence is that the entire story advanced by employer is a fabrication, in that McDonald and Sears, alleged by Henkel Corporation to have been the decision-makers who orchestrated his termination, in fact were not the decision-makers at all, but rather that the true decision-maker was Robert Kahn, Director of Human Resources in Henkel's United States headquarters in Ambler, Pennsylvania, that Tuck's discharge was decided by Kahn nearly three months before McDonald and Sears allegedly

decided on his termination, and that Kahn's decision was influenced by Dr. Rudy Heer, he having been Tuck's former direct supervisor and then being head of Henkel's Textile Chemical Research & Development Group (R & D Group) at the Sugar Creek Road Plant in Charlotte, where Tuck was Plant Manager. From the evidence, the factfinders could easily determine that Dr. Rudy Heer was age biased.

Thus, the only real question presented, same being one for which the answer is too apparent to require argument and certainly not a question for this Court, is whether Tuck was required to rebut Henkel's alleged decision-makers' "specific reason" for his termination, or whether Tuck could show same was "pretext" by showing that Henkel's named decision-makers in fact

were not the actual decision-makers, and thus that their "stated" reasons for his termination are immaterial, as well as being false and therefore unworthy of credence.

II. REBUTTAL TO PETITIONER'S CONTENTION THAT THE APPEALS COURT FAILED TO FOLLOW THE COURT'S REQUIREMENTS IN ANDERSON V. LIBERTY LOBBY, INC. IN EVALUATING TUCK'S PRETEXT EVIDENCE.

Henkel's Petition for Writ of Certiorari (page 8, page 21, and Conclusion on page 29) urges this Court to grant review on the basis of Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), alleging that Tuck failed to show that there is a dispute "over facts that might affect the outcome of the suit under the governing law."

Petitioner further states at page 8 in its Petition for Writ of Certiorari:

> "In employment discrimination cases, this Court's governing law recognizes that when an employer advances specific reasons for a challenged employment decision, a plaintiff's pretext evidence must focus on those specific reasons. Burdine, 450 U.S. at 256 (1981)."

Respondent respectfully points out that a perusal of Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), at page 256, and at all other pages, fails to reveal any language, directly or by inference, resembling this statement of the law advanced by Petitioner. The statement Petitioner attributes to Burdine simply is a misstatement.

The holding in Burdine, 450 U.S. at 256 (1981), just as in McDonnell Douglas Corp. vs. Green, 411 U.S. 792 (1973), which Burdine cites, is that after the employee establishes its prima facie

case, and after the employer presents its legitimate reason for its action, "plaintiff will have a full and fair opportunity to demonstrate pretext"..."to demonstrate that the proffered reason was not the true reason for the employment decision," and ultimately of persuading the court that the employee was the victim of intentional discrimination, "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."

No Court, to the knowledge of the undersigned, has ever <u>required</u> the plaintiff's "pretext" inquiry to focus <u>only</u> on "those <u>specific</u> reasons" articulated by the employer, albeit in most cases there is no dispute as to the decision-makers, thus the pretext inquiry

will be focused on the specific reasons articulated by the employer.

In offering proof that Henkel's named decision-makers were not in fact the actual decision-makers, Tuck here went to the very heart of the matter, showing the Court that Henkel's "explanation is unworthy of credence" in all respects, thus returning to Tuck the original presumptions of discrimination raised as a matter of law by his prima facie showing.

All of Tuck's evidence is directly in keeping with the decisions of this Court and of all circuits which have addressed the burdens and the order of presentation of proof in ADEA cases.

Likewise, the decision of the Fourth Circuit in this case (Pet. App. A-54, et seq.) in no way departs from those of this Court or of other circuits.

III. A. DID THE FOURTH CIRCUIT'S PRETEXT ANALYSIS CONFLICT WITH OTHER CIRCUITS' ANALYSIS?

B. WAS THE FOURTH CIRCUIT MISTAKEN IN RELYING ON EVIDENCE OTHER THAN THE COMPANY'S EXPLANATION OF SMITH'S SELECTION AS PLANT MANAGER IN PLACE OF TUCK?

C. DID THE FOURTH CIRCUIT'S DECISION SANCTION JURIES IN "SECOND-GUESSING" EMPLOYERS' BUSINESS JUDGMENT UNDER THE ADEA?

Lengthy and scholarly rebuttal could be made to each of Petitioner's contentions urging an affirmative reply with respect to the above three questions argued in its Petition.

As to all of these arguments advanced by Henkel, again, each would only be applicable if prefaced by a requirement that the trial court and the employee be bound to accept as true the names of the "decision-makers" as designated by the employer, and be

precluded from showing that the "decision-makers" designated by the employer were fabricated, and thus that their "legitimate, nondiscriminatory reason" advanced for otherwise apparent discriminatory action is not worthy of credence.

The important point for this Court to recognize is that the Fourth Circuit simply has ruled that Tuck has presented sufficient evidence of pretext for this case to be heard by a Jury, and has then gone on to set out the many respects wherein Tuck's evidence tends to show that "pretext."

The Fourth Circuit's decision conflicts with the decisions of no other circuits or of this Court, nor does Respondent disagree with said decisions or urge here any change in said decisions.

The Fourth Circuit's opinion clearly restates the analysis factors set out in McDonnell Douglas, Burdine, and other cases which have spoken on the subject.

The Fourth Circuit reviewed Tuck's prima facie case, and agreed that Henkel met its rebuttal burden of presenting legitimate, nondiscriminatory reasons for Tuck's termination. It did not require Henkel to "prove" its proffered reasons, but only to articulate same.

However, the Fourth Circuit ruled that the District Court erred in weighing Tuck's evidence that Henkel's asserted reason was a mere pretext, ruling that Tuck has shown that Henkel's rationale is unworthy of credence, thus that Tuck has carried his burden and is entitled to trial. This in no way departs from the established law in ADEA cases.

In fact, the Fourth Circuit fully

acknowledged Petitioner's arguments that what is important in ADEA analysis is the employer's reason for dismissing the employee at the time the decision is made, not what might have transpired afterwards, and stated that even so, it is relevant to consider in assessing the credibility of Henkel's story what happened after Tuck's termination, it being the place of the jury, not the Court, to decide if such evidence suggested that Henkel's story is false. In support of Tuck's contention that Henkel's story was a fabrication, it certainly is admissible and material to show that not one of the employer's stated reasons for needing Mark Smith's superior educational background, as opposed to Tuck's expertise as Plant Manager, was true.

Burdine, at page 259, covered this

point when it said "...The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination" (emphasis added).

The Fourth Circuit decided that Tuck had presented sufficient evidence to create a material dispute as to whether age is a more likely reason for his dismissal than Henkel's asserted reason, as well as some probative evidence that Dr. Heer, Tuck's former Supervisor, was biased against older workers and that Heer influenced the decision to fire Tuck. The Court pointed out that Tuck contended Kahn, influenced by Heer, who was head of the R & D Group and thus the largest beneficiary of Tuck's discharge,

was the real decision-maker, while Henkel contended otherwise.

Their opinion went on to point out that in open court the District Court below expressed concern over Heer's age bias and whether he influenced Tuck's dismissal, but was ultimately persuaded in Henkel's favor, and so resolved that factual issue against Tuck.

By making this determination, the Fourth Circuit ruled that the District Court, which itself recognized the factual dilemma (Pet. App. A-12 through 16), denied Tuck the benefit of all permissible inferences, it being the jury's job at trial to weigh the evidence, and not the Court's business to do so at summary judgment.

It is respectfully submitted that this case presents only a question of sufficiency of evidence and that there is

absolutely nothing in the Fourth Circuit's opinion which brings this case within the group of decisions reviewable by this Court pursuant to Rule 10 of the Rules of the Supreme Court of the United States.

IV. REBUTTAL TO PETITIONER'S CONTENTIONS THAT THE APPEALS COURT ERRED IN CONCLUDING TUCK'S EVIDENCE SUPPORTS A VERDICT OF AGE DISCRIMINATION UNDER RULE 56.

Again, on pages 22 and 23 of its Petition, Henkel places great reliance on Liberty Lobby, arguing that Tuck's proffered evidence reveals no genuine issue of material fact, and again stating that "only Sears and McDonald made the management decision to select Smith over Tuck for the reconstituted plant manager position," and again stating, at page 23, that "for Tuck's evidence to be significantly probative as required by

Liberty Lobby, such evidence should involve actions or statements of these two officials..." citing "Mechnig, 864 F. 2d at 1366 (evidence of pretext requires evidence of actual decisionmakers)."

In the first place, as heretofore pointed out, this case and the Fourth Circuit's opinion are about the amount and nature of Tuck's evidence, and not about conflicts in ADEA law among circuits.

In the second place, Liberty Lobby was a libel action and not a discrimination case. While it discussed various rules with respect to summary judgment, more appropriate to Tuck v. Henkel Corp. is the following from Thornbrough v. Columbus & Greenville Railroad Co., 760 F. 2d 633 (5th Cir. 1985), at page 640:

> "In general, summary judgment is an inappropriate tool for resolving claims of employment discrimination, which involve nebulous questions of motivation and intent" (citing cases to the same effect), "which depends on complicated inferences from the evidence."

In the third place, in Mechnig v. Sears, Roebuck & Co., 864 F. 2d 1359 (7th Cir. 1988), there having been no contention by Mechnig that Hawley and others were not the true decision-makers involved in Mechnig's termination for falsifying time cards, that case, and the accepted law that statements from non-decision-makers are insufficient are not applicable to the Tuck case.

Tuck is making no attempt to have the Court reexamine Henkel's business decisions, or interfere with its decisional process. What Tuck has done is present substantial probative evidence that Henkel's alleged "business

decisions" had nothing to do with his termination, that while McDonald and Sears may well have decided that Mark Smith would replace Tuck, the decision that Tuck should be terminated was made some months before by Henkel's Human Resources or personnel department in Ambler, Pennsylvania, and that Henkel's alleged business explanation was unworthy of credence. In fact, Tuck and the Fourth Circuit opinion are in complete agreement with the proposition stated in Mechnig, 864 F. 2d at 1365, that the inquiry is "whether the employer gave an honest explanation of its behavior," nothing more. To determine that, clearly all aspects of Henkel's alleged explanation for Tuck's termination bearing on the credibility of same may be explored.

CONCLUSION

The decision of the Fourth Circuit reversing summary judgment for the employer is entirely compatible with every circuit's rules governing summary judgment and with every circuit's analysis of the special rules of proof fashioned by the courts in ADEA cases.

The problem Petitioner faces, and no doubt one of the reasons for its Petition to the Supreme Court, is that if the Jury determines that those persons Petitioner claims were the "decision-makers" in fact were not, then the employer will have offered no "legitimate, nondiscriminatory reason" why someone else was preferred as Plant Manager over the plaintiff; plaintiff will have recreated the situation that obtained when his prima facie case was initially established; and, in the absence of any known or

articulated reasons for the employer's decision (by the actual decision-makers), the factfinders would be required to presume that the employer was motivated by discriminatory reasons [Thornbrough v. Columbus & Greenville Railroad Co., 760 F. 2d 633 (5th Cir. 1985), at pages 639 and 640]. In addition, Respondent's evidence of the actual age bias motivating the decision of the actual decision-makers makes wilful discrimination inescapable.

Contrary to Petitioner's contentions, this is entirely in keeping with the decisions of all other circuits, as well as with Burdine and Liberty Lobby, thus this Court should decline to review the decision of the Fourth Circuit.

Respectfully submitted, this 20th day of January, 1993.

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